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No. _____

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October Term, 1991

CHARLES FAIRCHILD,
RAY IMBAGLIAZZO,
RAUL RODRIGUEZ and
NELSON STATOM,
CERTAIN STEPHANS CLASS
IN PRO PER,

Petitioners,

vs.

PACIFIC MARITIME
ASSOCIATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this court should issue a Writ of Certiorari because the Ninth Circuit, contrary to its own decisions and the decisions in other circuits, concluded that the District Court had subject matter jurisdiction to uphold an order to enforce under a Consent Decree despite the fact that the primary asserted basis of relief for the petitioner was under Section 503 of the Rehabilitation Act of 1973, which does not create or provide a private cause of action for such handicapped persons, and by so doing violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution.

II. Whether this court should issue a Writ of Certiorari because the Ninth Circuit erroneously concluded that the Federal District Court apparently had primary jurisdiction and the individual petitioners

were not required to exhaust the administrative remedy by filing a Complaint with the Department of Labor as mandated by Congress under the Federal Rehabilitation Act of 1973, and as a consequence has violated the petitioners' rights of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution.

III. Whether this court should issue a Writ of Certiorari because the Ninth Circuit should have required the District Court to not dismiss the Contempt proceeding because of the "No Signal" work exemption is blanket in its application and does not consider the individual physical impairment of the affected individual employee and makes no attempt for reasonable accommodations for that particular individual's physical disability or impairment in accordance with the guide lines of American Medical

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OFFICIAL REPORTS OF OPINIONS HEREIN:

The Opinion below does not appear in the Official Reports of the United States Court of Appeals because it was not certified for publication. Nor was the order denying the petition for rehearing.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. Section 1254 and United States Supreme Court Rule 10.1(a)(c), this court has jurisdiction to consider this Petition for WRIT OF CERTIORARI to review the decision of the Court of Appeals for the Ninth Circuit. Jurisdiction in the District Court was based on 29 U.S.C. Section 793. The Ninth Circuit entered its memorandum order on July 15, 1991. (Appendix A.) A timely petition for rehearing to the Ninth Circuit was denied on October 24, 1991. (Appendix B.)

STATUTORY PROVISION AND POSSIBLE APPLICABILITY OF 29 U.S.C. Sec. 793

This case requires construction of 29 U.S.C. Section 793 to determine whether or not it creates a private cause of action on behalf of physically handicapped workers subject to federal contracts and affirmative action programs mandated by Congress and the rules and regulations promulgated by the Department of Labor pursuant to the congressional mandate.

STATEMENT OF THE CASE

The original Plaintiffs in this action filed a class action complaint on October 27, 1980 alleging that the Defendants had engaged in discriminatory employment practices against women in violation of Title VII of the Civil Rights Act 1964, as amended, 42 U.S.C. §2000e et seq. This group of persons is called the "Golden class." The Defendants in this action are the PACIFIC MARITIME

ASSOCIATION (hereinafter "PMA"), INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (hereinafter "ILWU"), Local 63 of the ILWU, herein referred to as "Local 63" or "Clerks Local" and Local 13 of th ILWU (sometimes hereinafter referred to as "Local 13" or "Longshore Local").

Defendant PMA is an employer association of, among other, the stevedore and companies of the Los Angeles - Long Beach port. The union Defendants are collective bargaining representatives for employees performing Clerk and longshore work for the PMA stevedore and shipping companies.

On May 18, 1981, a group of complainants intervened in the action contending that they represented a class of persons who claimed that the Defendants had violated certain rights of theirs under the collective bargaining agreement between PMA and the ILWU. This group of employees is the the

"Bower Class" and is composed of all male persons who were not registered as marine clerks who had been dispatched as casual employees to marine clerk jobs by the marine clerks dispatch hall.

The third group who intervened is the "Stephans Class." This class is composed of all persons who had been, or are qualified, or in the future would qualify, to be dispatched to extra clerks' work as "injured longshore workers'. The basis of their complaint was, among other things, contentions of violation of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793(a). (Appendix F.)

Subsequently, the Court entered a Consent Decree on May 25, 1983. (Appendix E.)

A Memorandum Re Fairness of Settlement was likewise filed by the Court. (Appendix E.)

Prior to the entry of the Consent Decree, injured longshoremen, who could physically

only perform clerks' work by reason of their physical disability, paid dues to both Local 13 and Local 63. As a result, the injured longshoremen reported to the dispatch hall of Local 63. After the dispatch of all marine clerks, "clerk work" was then dispatched to the injured longshoremen. If excess marine clerk work was available, it was then transferred to Local 13 and dispatched under its dispatch procedure. At this time, injured longshoremen, who could only perform clerks' work, had an exemption from performing certain types of longshore work, which were considered light duty as compared to other longshore type jobs. This included what is called "front work" and "signal work". This was generally called "N.F.S." or "N.F.N.S.". This was understood to mean "no front, no signal" work. As a result, these injured longshoremen were not required to perform either front work or signal work.

Following the signing of the Consent Decree, the injured longshoremen referred to above were assigned back to Local 13 for dispatch.

Marine clerk work was dispatched through Local 63. it was first assigned to employees in marine clerk "A" category. The next order of priority were those persons in the "Golden" class and the "Bowers" class. Any excess marine clerk work was then assigned over to Local 13 for dispatch under its procedures. At Local 13 the work was first assigned to the dispatch board consisting of employees with the lowest average hours worked. It is called the Low Board. The Low Board would be comprised of members who had the lowest number of average hours within a given period of time. It is one of approximately 15 boards of various job categories. After exhausting the dispatch of members checked in on the Low Board, excess clerks work would then be

offered to the injured longshoremen, after exhausting any other lower boards. Under these dispatch procedures, the injured longshoremen, who had a "no front, no signal" exemption, would not be penalized by declining to perform those particular jobs by reason of their physical inability to do so and would still be available to perform marine clerk work if such work were otherwise available.

This procedure continued without change until June 15, 1987. Rather than make an application to the Court, as contemplated by ¶¶16, 30 and 34 of the Consent Decree, the Joint Port Labor Relations Committee, which has overall responsibility for the operation of the dispatch procedures at Local 13 and 63 aforesaid, determined that it would no longer recognize and honor the "no signal work" exemption previously afforded certain injured longshoremen, who had submitted medical evidence from their treating surgeon to support

a finding of physical impairment from performing such duties.

The Consent Decree recognized the existence of a "Casualty Board" at the dispatch hall in the Los Angeles - Long Beach port. Paragraph 43 clearly recognized that a procedure existed whereby injured longshoremen could be dispatched to extra marine clerks work if such an employee submitted a doctor's report or certificate setting forth the longshoreman's injuries or disabilities. Paragraph 44 of the Consent Decree attempted to provide a more equitable assignment of this extra marine clerks work for longshore workers that were either temporarily or permanently disabled. The extra marine clerk work was assigned to the Casualty board as were all "front jobs" as that term is known in the port. All persons desiring to receive "check-in" rights on the Casualty board were required to be examined by physician or

physicians chosen by the Joint Port Labor Relations Committee (hereinafter referred to as J.P.L.R.C.).

Paragraph 47 of the Consent Decree charged to the J.P.L.R.C. with the responsibility of considering whether an injured longshore person would be unable to perform certain work dispatch from the Casualty Board. It specifically provides as follows:

> ". . .If the Committee so determines, based upon the physician's report, it shall specify the types of work that the injured longshore person need not perform. If such a determination is made, it shall become a part of the certification of that longshore person to the Casualty Board and the person so certified may thereafter, so long as he or she remains so certified, refuse any such work offered that would be in contravention of the certification. Such refusal of work shall not be considered as grounds for denying benefits to an injured longshore person under the Pay Guarantee Plan or for any penalty whatsoever."

Each of the individual named - petitioners had been assigned a "no front,

no signal" exemption at the time the J.P.L.R.C. made the blanket determination to no longer recognize any and all "no signal work" exemption. The rights of petitioners herein were severely prejudiced because the blanket refusal to recognize this exemption did not properly consider the nature and extent of their physical impairment as to whether or not it precluded him from performing the duties of "signal work."

The implementation of the change in the rules and procedure with respect to the elimination of the "no signal work" exemption had its origins in exemption requests and the official J.P.L.R.C. meetings in February 1983. It should be noted that this was just several months after the signing of the Consent Decree and a few months after its entry by the Court.

At a J.P.L.R.C. Meeting of April 13, 1983, the Committee again met to discuss the Casualty Board as established in the Consent Decree, and in particular addressed its items to Paragraphs 43 through 47.

During the course of that early meeting, the union representatives recommended that certain job descriptions be established. These included front jobs, signal jobs, winch driver jobs and clerks' jobs. At that meeting, the Committee agreed that a longshoreman on the Casualty Board must accept front work and signal work jobs prior to accepting clerk work.

However, the implementation of this early determination was not done until it was "revitalized" in or about July 1986. By that time, the J.P.L.R.C. had selected Dr. Michael S. Wald to serve as the physician contemplated by Paragraph 45 of the Consent Decree. Dr. Wald was selected by

the J.P.L.R.C. in 1985.

In July 1986, the J.P.L.R.C. met to discuss the question relating to Casualty Board members claiming they cannot perform front work or signal work and by so doing, claiming that they could only perform marine clerks work. This is the category of the four named petitioners in Pro Per.

At that time, the Committee discussed the possibility of allowing an exemption on the Casualty Board from front work only.

It was at this meeting that the Committee further agreed to conduct another tour of the harbor for Dr. Wald so that he could observe the various jobs dispatched from the Casualty Board.

Once again, on February 18, 1987, the J.P.L.R.C. reached an agreement to meet with Dr. Wald concerning the possibility of requiring all individuals checking in on the Casualty Board to take signal work

and marine clerk work or take the 6 hour "flop" penalty. Following a discussion at this meeting, the Committee agreed to meet with Dr. Wald concering this issue.

Dr. Wald made two visits to the waterfront to observe various jobs under the guidance of the J.P.L.R.C. The first occurred in February 1987. The second tour of the waterfront area occurred on March 4, 1987. Following the tour with Dr. Wald on March 4, 1987, the J.P.L.R.C. representatives met immediately thereafter, and the Committee discussed the exemption request of injured longshoremen from performing signal work. The employer representatives took the position that the Consent Decree did not provide an exemption from signal work and that an individual could perform signal work if he could perform marine clerks work.

On or about May 27, 1987, a bulletin was circulated among employees in the harbor informing them of the intended decision of the J.P.L.R.C. to no longer grant the signal work exception. The J.P.L.R.C. met on June 1, 1987. At this meeting, the Committee agreed that the only exemption to be granted from the Casualty Board was front work. Exemptions from performing signal work would no longer be granted effective June 15, 1987.

This determination was made without any of the parties making an application to the Court to modify the terms of the Consent Decree entered on May 25, 1983.

It should be noted that the change in the rules and procedures was drastic. The exemption had been permitted before the Consent Decree and during the first four years of the implementation of the Consent Decree. An exemption from "signal work"

would be granted based upon the physical impairment of the injured longshoremen. The degree and extent of physical impairment was based upon the medical disability of that particular individual. The effect of the change in the rules and procedures was to no longer permit any exemption from the performance of signal work regardless of the physical impairment assigned by a physician. Instead, the effect of the rule change was to require every injured longshoreman to perform signal work irrespective and without consideration of that particular individual's physical impairment or physical disability. It was now mandatory for an injured longshoreman to accept a signal work assignment or else lose a work opportunity or be charged with "passing up a work opportunity." He now was ineligible for Pay Guarantee Plan. The "work opportunity" was not considered to be a "volunteer"

job, which could be rejected without penalty, as was the case with all other job categories on all other dispatch boards. As such, it was a discriminatory employment practice, which now permitted the employer to have the work assigned to outside, unregistered casual workers at approximately one-half the wage cost.

It was this unilateral implementation of a change in the rules and procedures without making application to Court for modification of the Consent Decree as contemplated by ¶¶'s 16, 30, and 34 thereof, that led to the filing of the motion in re contempt by these affected petitioners.

The evidentiary hearing before the Honorable Robert M. Takasugi took approximately six days. Following the submission of evidence, which consisted of declarations, direct testimony of witnesses, 77 photographs, a video and documentary

evidence, the Court issued its Findings of Fact and Conclusions of Law (Appendix D) and an Order dismissing the contempt proceedings on May 30, 1989. (Appendix C)

The injured longshoremen - petitioners herein filed an appeal on June 29, 1989.

The petitioners are injured longshoremen and members of the Stephans Class. The four individual petitioners are Charles Fairchild, Ray Imbagliazzo, Raul Rodriguez and Nelson Statom.

Charles Fairchild had been working in the harbor area as a casual employee since July 4, 1963. He continued to do so over the years. He obtained a sufficient number of hours of employment as a casual employee to reach longshoreman "B" status on January 20, 1982.

On June 15, 1982, Fairchild suffered an injury to his cervical spine and lumbar

spine when a 40 lb. box of bananas hit him on the head while a banana boat was being unloaded. This individual has pain throughout his cervical spine with radiation into his left shoulder and left arm with occasional numbness and twitching of the left hand. He also has constant pain throughout the lumbar spine with radiation into the left leg and foot which sometimes is accompanied by cramping and tingling of the toes of the left foot. Each of these conditions is aggravated by prolonged standing, bending and stooping. In addition, he holds his neck quite rigid and in a guarded position. He walks rigidly with his back in a hyperbolic position. Since he demonstrates rigidity and muscle spasm in the cervical and lumbar spine areas with a moderate limitation of motion throughout both the cervical and lumbar spines, Fairchild has been unable to perform signal work without

severe pain. He has difficulty raising his head. He cannot crane his neck. He cannot stand for any appreciable length of time. He has great pain when he uses his left hand and arm, especially when raised to near, at or above shoulder level.

For a period of time from June 1982 through January 1984, he did work as a signalman against the doctor's orders in order to obtain a sufficient number of hours of work in order to get certain benefits under the collective bargaining agreement. In order to do so, he took medication to ease the pain. This medication included Codeine, Motrin and Tylenol.

Fairchild first went on the Casualty Board on April 1, 1984, after achieving "A" Status.

Fairchild testified that he was granted a no signal work exemption by Dr. Wald by his reports of July 17, 1985 and october 24, 1986.

Fairchild testified that (next to the vessel) signal work requires standing "under the hook" to signal the crane operator. It involves looking up for long periods of time, constant standing, raising your arms over your head for much of the day giving signal to the crane operator so that he can see them and the extension of the neck in checking the cargo. Only a few of the signal jobs use a radio from a vehicle. These jobs generally are signalmen performing work on the "blind side" of a transtainer. These persons are not in direct view of the crane operator and do not give hand signals. Other signal work is in a container yard under a transtainer. (See photos 1 through 77)

Because of his physical impairment and the restrictions with respect to the cervical spine and lumbar spine, Fairchild has been unable to perform signal work since

he cannot hyper extend the neck, cannot stand for any prolonged period, and cannot raise his left arm and hand without pain.

The automatic elimination of the signal work exemption irrespective of an individual's physical impairment has had a serious adverse effect on the work opportunities available to Fairchild. Since he must now take a signal job, he has been unable to work in any position in the harbor since the policy of June 15, 1987. This is true, even though he is willing and able to perform certain duties of the marine clerks classification. However, he never receives an opportunity for that type of work, since he must first accept a signal job if one is available before the marine clerks work becomes available under the present operation of the Casualty Board system.

Ray Imbagliazzo was employed as a longshoreman. On February 9, 1982, he was injured when a 40 lb. box of bananas struck him on the neck and shoulders while he was unloading a banana boat. This injury required two spinal surgeries in 1983. As a result of the injures, he was not able to return to work until late January 1984. When he returned to work, he tried to do dock work, front work and signal work. He experienced great difficulty in attempting to perform these particular jobs and asked to be placed on the Casualty Board.

As a result of the injuries to his cervical spine and thoracic spine and right shoulder, he was restricted from performing any type of work which requires prolonged standing, elevation of the arms above shoulder level, or extension of the neck. He experiences constant pain throughout the cervical spine and thoracic spine. Further,

he experienced a 50% loss of motion in all planes of the cervical and thoracic spine and the right shoulder area.

As a result of their physical disabilities, Mr. Imbagliazzo was granted a "no front, no signal work" exemption and was assigned to marine clerk work under the Casualty Board procedures. This remained so until the policy and procedure change in the dispatch rules effective June 15, 1987. As a result Mr. Imbagliazzo cannot perform "signal work" because he cannot hyperextend the neck, cannot move his arms above the shoulder, and cannot stand for any prolonged length of time.

Mr. Rodriguez was first employed by PMA as a merchant seaman following service in the United States Army during World War II. He remained a seaman from 1947 until 1967 and worked part-time as a longshoreman.

In or about 1967, he became a full-time longshoreman. In 1971 he suffered knee injury and was placed on the Casualty Board. Subsequently, on July 21, 1975, Mr. Rodriguez sufferred a brain hemorrhage which placed further physical restrictions on him. As a result of these injuries, Dr. Wald imposed work restrictions upon him and provided in his medical report of February 3, 1986 that Mr. Rodriguez cannot accept work which requires sudden movement of his head or any type of looking up or looking down and, for those reasons, was limited to work as a checker (marine clerk work) on the Casualty Board. Mr. Rodriguez performed such clerk work off the Casualty Board for approximately 16 years prior to June 15, 1987.

The impact of the elimination of the "no signal work" exemption applied to Mr. Rodriguez notwithstanding his physical

impairments or physical disability. Mr. Rodriguez has not been able to perform signal work because he can't look up, can't bend down and can't stand very long.

Even though he possesses these work restrictions and physical impairments, he must suffer a "loss of work opportunity" when he checks in on the Casualty Board as a result of the change in the rules and procedures on June 15, 1987. In reality, he never receives an opportunity to perform marine clerk work because he turned down signal work. It should be noted that Mr. Rodriguez did not initially turn down signal work. He first tried to perform the work. He found, after trying it several times, that he could not perform these particular work duties, because it required him to look up and down.

Nelson Statom is a class A longshoreman who suffered an injury on the job. The

injury resulted in a torn rotator cuff of the right shoulder. He was seen by Dr. Wald, who placed certain restrictions upon him. These included a work restriction that he could not raise his right arm higher than shoulder level. Mr. Statom also testified that he cannot do much standing or walking as a result of his injuries.

Prior to June 15, 1987, Mr. Statom was able to perform marine clerk work on the Casualty Board since he possessed the "no front, no signal" exemption. After June 15, 1987, he no longer was permitted to claim that exemption from performance of signal work. He, like the other affected employees, has suffered a severe loss of work opportunities because he cannot physically perform the duties of signal work. Statom, like Rodriguez, attempted to perform this work at least on two separate

occasions. The last day he tried to perform such signal work was December 22, 1987. He found it very hard. He also had to take medication while he was performing the work as a signalman. It included Aspirin, Excedrin and Tylenol, but did not help much.

In 1987, Mr. Statom needed to work 14 hours to make a sufficient number of hours in order to qualify for certain welfare, vacation, medical and pension benefits under the collective bargaining agreement. He is not able physically to perform signal work. He remains ready, willing and able to return to work as a marine clerk in a position that he can perform.

On July 15, 1991, the Ninth Circuit Court of Appeals affirmed the Order of the District Court. (See Appendix A.) In particular, the Court concluded it had subject matter jurisdiction notwithstanding the fact that the primary asserted basis

the Stephans class for intervention was a claim under Section 503 of the Rehabilitation Act of 1973. The Court had previously concluded that it did not provide a private cause of action. Further, the Court ignored the Congressional mandate and its decision in Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981), cert. denied, 459 U.S. 881, 74 L.Ed.2d 146, 103 S.Ct. 178, and the decisions holding that primary jurisdiction of such claims is with the Department of Labor. As a result, persons, such as petitioners, are required to exhaust the administrative remedy with the Department of Labor, which is charged with the responsibility and has the administrative expertise to promulgate uniform rules, reasonably accommodating physically handicapped workers employed by federal contractors. Further, the effect of the Ninth Circuit's order affirming

the District Court decision is contrary to the requirement to make an attempt for reasonable accommodation of the individual's particular physical disability or impairment as determined by the disability guidelines established by the American Medical Association in accordance with the Department of Labor regulation set forth in 60 C.F.R. ¶ 741.7. The refusal to do so denies these petitioners due process and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution. A timely petition for rehearing was denied on October 24, 1991.

ARGUMENT

I

WHETHER THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE NINTH CIRCUIT, CONTRARY TO ITS OWN DECISIONS, UPHELD THE ORDER OF THE FEDERAL DISTRICT COURT EVEN THOUGH THE COURT DID NOT HAVE PRIMARY JURISDICTION TO ISSUE AN ORDER AFFECTING THE RIGHTS OF THE INJURED LONGSHOREMEN'S STEPHANS CLASS PLAINTIFFS IN THE CONSENT DECREE BECAUSE THE RIGHTS ASSERTED BY THE STEPHANS CLASS WERE UNDER SECTION 503 OF THE FEDERAL REHABILITATION ACT (29 U.S.C. § 793) AND AS A RESULT PETITIONERS HAVE BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENT.

Federal Courts are Courts of limited jurisdiction. They do not have the broad jurisdiction of most state Courts. As a result, federal jurisdiction is always subject to question at any time before an appellate judgment becomes a finality.

The jurisdiction of a federal court can be raised at any stage of the proceedings. It can be raised even by the party

originally invoking the federal court's jurisdiction. Television Reception Corp. v. Dunbar, 426 F.2d 174 (6th Cir. 1970).

The first and fundamental question on every appeal is that of jurisdiction. If jurisdiction of the District Court is lacking, the power of the Court of Appeals is limited to correcting the error of the District Court and entertaining jurisdiction. Transport Mfg. & Equipment Co. of Delaware v. Trainer, 382 F.2d 793 (8th Cir. 1966). It is the duty of the appellate court to note the lack of the jurisdiction on its own motion. Philbrook v. Glodgett, 421 U.S. 707, 44 L.Ed.2d 525, 95 S.Ct. 1893. Federal jurisdiction cannot be assumed. It must be clearly shown. In a case under review, the Court of Appeals must satisfy itself not only of its own jurisdiction, but also that of the District Court. Chicago Stadium Corp. v. The State of Indiana, 220

F.2d 797.

The existence of Federal jurisdiction must appear from the record positively and it is not enough against objection that it may be inferred argumentatively. Therefore, the record must show that the controversy was not one of those cognizable by the Federal Court. Continental Life Insurance Co. v. Rhodes, 119 U.S. 237, 30 L.Ed. 380, 7 S.Ct. 193.

The four named petitioners herein are individual in pro per Plaintiffs and members of the Stephans Class. The Stephans Class was a group of intervening Plaintiffs that represent a class of persons who claim that the Defendants had violated their rights under the Federal Rehabilitation Act of 1973 (29 U.S.C. § 793). While the Court properly had jurisdiction of the claims of the Golden class and the Bowers class, it is respectfully submitted that

the District Court did not have jurisdiction to enter an order affecting the Stephans Class as a part of the Consent Decree because it involved a disposition of the rights of these injured workers who claim rights and benefits under the Federal Rehabilitation Act as a result of their status as injured longshoremen or workers with a physical handicap.

The District court considered this question in its Memorandum re Fairness of Settlement. The Court assessed the strength of the Stephans Class claims. The court specifically noted that the claims of the Stephans Class arise out of alleged unequal treatment for the handicapped longshoremen and the failure of the Defendants to make reasonable accommodations for the handicapped employees at the Port. The Court also specifically noted that the Stephans Class was foreclosed from asserting a

cause of action under the Federal Rehabilitation Act of 1973 by concluding that if the litigation continued, these claims would have to be dismissed. (Appendix E - p. 111) In particular, it appears that the Court was aware of the Ninth Circuit Court's decision in Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981) cert. denied, 459 U.S. 881, 74 L.Ed.2d 146, 103 S.Ct. 178.

Notwithstanding its awareness of the Ninth Circuit decision and the conclusion that the Stephans Class would be foreclosed from asserting a Cause of Action under the Federal Rehabilitation Act if the litigation continued, the Court nonetheless, indicated that the handicapped workers would be provided with a new casualty board and a system of certification for light work which would presumably safeguard against false claims having the effect of displacing the truly handicapped longshore worker.

They subsequently approved the proposed Consent Decree.

Fisher v. City of Tucson, supra, was an action brought by Fisher alleging that the City of Tucson violated § 503 of the Rehabilitation Act of 1973, by failing to hire him as an industrial electronics technician. Fisher, who suffered from a physical handicap, argued that the City of Tucson violated § 503 by discriminating against him on the basis of his handicap. He further contended that the City of Tucson failed to fulfill its contractual obligations under the Federal Rehabilitation Act to take affirmative action to employ such qualified handicapped individuals.

Section 503 of the Rehabilitation Act of 1973 mandates that any federal contract in excess of $2,500 contain a provision requiring that such contractors or subcontractors contracting with the United States

take affirmative action to employ and advance the employment of qualified handicapped individuals. Based upon the testimony of Mr. Ward that the U.S. Mail and military cargo receives priority, it is likely that the Defendants are subject to the Act.

If any handicapped individual believes that a contractor had failed or refuses to comply with the provisions of the contract regarding an affirmative action program to employ such qualified handicapped persons, the individual may file a complaint with the Department of Labor. The Department of Labor is charged with the responsibilities of promptly investigating such a complaint and to take such action as the facts and circumstances warrant.

This Court carefully considered whether or not Congress intended to provide a private action to enforce § 503. The Court concluded that Congress did not intend to

create a private right of action. Instead, the Court concluded that Congress meant to provide only for an administrative enforcement procedure under jurisdiction of the Department of Labor. See also: Myerson v. State of Arizona, 709 F.2d 1235 (9th Cir. 1983).

Based upon the foregoing authorities, it is respectfully submitted that a writ of certiorari should issue because the Court did not have primary jurisdiction to approve the provisions of the Consent Decree insofar as it affects the rights of the injured longshoremen, petitioners herein, because they had no right of a private action. Therefore, those provisions of the Consent Decree, insofar as they affect the rights of the injured longshoremen-petitioners herein, are null and void because the Court did not have primary jurisdiction of the claims they asserted as members of

the Stephans Class under the Rehabilitation Act of 1973 (29 U.S.C. § 793). As such, the petitioners have been denied due process and equal protection in violation of the Fifth and Fourteenth Amendments to the Constitution.

II

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE NINTH CIRCUIT, CONTRARY TO ITS DECISION AND THE DECISIONS OF OTHER CIRCUITS, DID NOT REQUIRE THE INJURED LONGSHOREMEN TO EXHAUST THE ADMINISTRATIVE REMEDY WITH THE DEPARTMENT OF LABOR AS PRIMARY JURISDICTION WAS MANDATED TO IT BY CONGRESS UNDER THE FEDERAL REHABILITATION ACT, AND THE REFUSAL TO DO SO VIOLATES PETITIONERS' RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The doctrine of primary jurisdiction provides that where the law vests the power to decide a controversy or treat an issue with an administrative agency, the Court will refrain from entertaining the case

until the agency has fulfilled its statutory obligation. Thus, by a Federal Court, as here, is presented with a case within its jurisdiction but which involves an issue within the confidence of an administrative body in an independent proceeding. The principles of comity and avoidance of conflict, as well as uniformity and consistency in the regulation, suggest propriety in referring the issue to that agency for decision in the first instance. California v. Federal Power Commission, 369 U.S. 482, A.2d, S.Ct. 901, 8 L.Ed.2d 54 (1962); Montana-Dakota Utilities Co. v. Northwestern, 341 U.S. 246, 254, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

The doctrine is grounded in the very significant policy consideration that recognizes that the administrative agency may develop a great degree of expertise that first should be brought to bear upon

specialized problem before the judiciary intervenes. It also conserves substantial judicial resources. Further, the action is justified on the basis that it achieves uniformity and consistency in the regulations of those businesses and activities with which Congress is concerned.

The regulatory scheme of § 503 is a detailed administrative procedure promulgated for remedying alleged violations of Section 503 of the Federal Rehabilitation Act. Upon receipt of a complaint from an individual alleging that he as been aggrieved by a government contractor's failure to discharge its obligations, the Department of Labor must promptly investigate his allegations. If, after the investigation, the Department of Labor concludes that no violation has occurred, the complainant may request review of that decision by the Director. If the investigation reveals

that a violation of the Act or regulations has occurred, the Department of Labor must first attempt to secure the contractor's compliance through conciliation. If the resolution of the dispute cannot be accomplished through the informal process of conciliation, the Department of Labor, and not the complainant, is authorized to seek alternative remedies, including commencement of court action, institution of administrative hearings and proceedings, and the like.

The Ninth Circuit Court has continually held that Congress did not intend to create a private action to enforce §503, which provides for an administrative enforcement procedure under the Department of Labor. See Fisher v. City of Tucson, supra; Myerson v. State of Arizona, supra, 709 F.2d 1235 (9th Cir. 1983).

Nothwithstanding the existence of those authorities, the Ninth Circuit still upheld the lower Court's decision and permitted the Federal District Court to litigate those specific issues that Congress mandated be handled by exhausting the administrative procedure set up by the Department of Labor. For those reasons, the court order of July 15, 1991, and the provisions of the Consent Decree are null and void and a writ of certiorari should issue because the Court did not have jurisdiction of the claims they asserted as members of the Stephans Class.

III

WHETHER A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE NINTH CIRCUIT, RATHER THAN FOLLOW THE SPECIFIC ADMINISTRATIVE PRINCIPLES SET UP BY THE DEPARTMENT OF LABOR, PERMITTED THE DEFENDANTS TO UNILATERALLY REQUIRE THE INJURED LONGSHOREMAN TO ACCEPT PARTICULAR WORK WITHOUT CONSIDERING THE PHYSICAL IMPAIRMENT OF THE AFFECTED INDIVIDUAL EMPLOYEE AND WITHOUT MAKING ANY ATTEMPT FOR REASONABLE ACCOMMODATION FOR THAT INDIVIDUAL'S PHYSICAL DISABILITY OR IMPAIRMENT BY UTILIZING THE GUIDELINES OF THE AMERICAN MEDICAL ASSOCIATION.

The bulk of the testimony at the six days of trial during the evidentiary hearing dealt primarily with the performance of Signal Work and Marine Clerks work.

A number of injured workers testified with respect to the performance of signal and clerks work. In particular, the testimony from numerous witnesses, coupled with the 77 photographs and the video submitted to the Court, clearly establish that there are a variety of signal jobs. Similarly,

that same vidence clearly discloses that there are a number of marine clerk type jobs. No effort is made in the dispatch procedure to determine which type of signal jobs are less arduous than others. No attempt is made in the implementation of the Consent Decree to determine which marine clerk type jobs are more physically demanding or more arduous than others. Instead, a blanket conclusion is made that if an injured longshoreman can perform any kind of marine clerks work, he therefore, can perform any type of signal work.

It is respectfully submitted that this conclusion is invalid and is not supported by the evidence in the record as a whole. The undisputed evidence discloses that there are signal jobs which require constant standing with very few opportunities for a break or an opportunity to sit down. At the same time, there is evidence

that a signal man occasionally may be able to sit in a vehicle. However, the evidence does not establish that every signal man can sit in a jeep or jitney and still be in a position to signal the crane operator. The purpose of the signal man is to establish contact with the crane operator so that they can transfer a container or any other heavy object from a ship to a bottom cart, or from a stack of containers on the dock to a truck bed.

The most important factor for a signal man is to establish contact with the crane operator, so that the crane operator can receive directions and instructions from the signal man with respect to the load as it is being shifted from one place to another. It is established that the crane operator is anywhere approximately 90 to 130 feet higher from the ground from where the signalman is located. The signalman

makes use of hand signals. The signalman may use both hands. Some signalmen use only one hand. Some signalmen signal from waist level. Some signalmen signal from shoulder level; other signalmen signal from a height above the shoulder. The critical test is that the signalmen use the signals by hand from a position where the crane operator can clearly see the signal, so that the signal is not obstructed by anything. The 77 photographs clearly establish that the substantial majority of signals transmitted by the signalmen are at or above shoulder level.

The only instance when the signalman may not be in visible contact with the crane operator is when that signalman is performing duties from the blind side. This is the opposite side of the container and as a result he is out of view of the crane operator. Such signals are transmitted by

radio. The evidence clearly establishes no other instance when signal communication is made by radio.

Most of the witnesses testified that the signalman is standing when making signals to the crane operator. There is some evidence suggesting signalmen can sit in a jeep or jitney to signal the crane operator. The testimony and 77 photographs do not depict such to be the normal circumstance. Instead, particularly when the signalman is under the hook, he cannot and is not sitting in the vehicle. The evidence clearly establishes logically that a signalman is in a reclining or sitting position is extremely rare.

There is also evidence that the signalman must look up because the crane operator is approximately 90 to 130 feet above him. Individuals may look up in a different fashion than other individuals.

Some persons may raise his head by bending his neck; others may lean back so as to bend his back as well as tilt his head; others may merely shift his eyes to look upward. However, since we are speaking of approximately a 90 to 130 foot distance, it is respectfully submitted that it is reasonable for a signalman to either crane the neck or tilt the head and neck as well as look up or bend slightly in order to clearly see the crane operator so the load may be safely transmitted.

Similarly, there is evidence in the record to establish that a person may give hand signals at waist level, chest level, shoulder level, or above shoulder level. It appears that the method or means of signaling is essentially the choice of the individual. It should be kept in mind that the most critical requirement is that the signal given by the signalman be clearly

visible to the crane operator. As a result, a substantial majority of the signals given by signalmen is at or above shoulder level. Similarly, signals, for the most part, are given with both hands at the various heights.

It is interesting to note that the testimony of Dr. Wald with respect to the performance of signal work and the performance of marine clerk work. While Dr. Wald concluded that the physical demands of the two jobs may essentially be the same, he specifically qualified that conclusion to establish that he did not mean that the two jobs were the exact same job. In fact, he concluded that some signal jobs may be physically less demanding than some clerk jobs and vice versa. He likewise concluded some clerk jobs are physically less demanding than some signal jobs and vice versa.

Dr. Wald concluded that there were some signal jobs that injured longshoremen could perform, and at the same time, concluded that there were some signal jobs that an injured longshoreman could not perform. Similarly, he made a conclusion that there were some clerk work that the injured longshoreman could perform, and on the other hand, there was some clerk work that the injured longshoreman could not perform. Dr. Wald reiterated this conclusion when he stated that there was a spectrum whitin the clerks job classification that ranged from quite sedentary in nature to some clerks job that were rather active physically. He also indicated that the same spectrum with with respect to the range of quite sedentary to being physically demanding was true of signal work as well.

As a result of these conclusions, coupled with Dr. Wald's criteria of using the major parameters of endurance, strength, and flexibility, Dr. Wald concluded that the physical demands of the two are essentially the same. As a result, he concluded, generally speaking, that if an injured longshoreman could perform clerks work, he could perform signal work, but he did not delineate or elaborate upon the variety of clerk jobs and signal jobs with respect to particular disability or impairment of the individual handicapped employee.

It is respectfully submitted that this approach is expressly contrary to ¶¶ 45, 46 and 47 of the Consent Decree and is not consistent with the AMA guidelines. Paragraph 45 requires that all persons desiring to receive "checkin" rights to the Casualty Board be first examined by a physician chosen by the J.P.L.R.C., who

is Dr. Wald. The physician is then required to prepare a report before the Committee can approve of the "check-in" rights. Any person dissatisfied with the decision of the Committee is supposed to have grievance and arbitration rights. However, elimination of the "no signal work" exemption was not based upon the physician's report for an individual affected employee, i.e., the injured longshoreman - Stephans' Class petitioners herein. Since the decision to eliminate the "signal work" exemption, was made by the J.P.L.R.C., the employees had no grievance rights.

Further, ¶ 47 requires that the J.P.L.R.C. consider specifically whether the injured longshoreman would be unable to perform certain work dispatched from the Casualty Board. The Committee is required to determine that issue based upon the physician's report. Such is absent in

the instant case insofar as it is applied to the appellant's herein. Instead, there is a blanket determination that the injured longshoreman can perform signal work irrespective of his physical impairment based upon a medical report ofDr. Wald or any other doctor. The rule applies in blanket fashion and fails to take into consideration any reasonable accommodation for the individual's specific physical disability or physical impairment.

Paragraph 47 of the Consent Decree requires the Committee to make that determination based upon the physician's report, which is required to address the person's physical impairment.

It is only after that criteria is met that such a refusal of work should be considered a rejection of a work opportunity so that the injured longshoreperson turning down a work opportunity is penalized

and does not otherwise receive the benefits of the pay guarantee plan.

It is also noted that the provision of 41 C.F.R. 60-741.7 requires that the medical documentation of a physical impairment be made pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment. However, the criteria established by Dr. Wald is devoid of any reference to any AMA guidelines. In fact, Dr. Wald is not a member of the AMA and he does not utilize the guidelines thereunder in the preparation of his report.

It is the position of the appellants that a more reasonable accommodation with respect to their physical handicap would be to delineate which particular signal type jobs a person could perform as well as the particular type marine clerk work the individual could perform based upon his actual individual permanent impairment.

Thus, under this system, there would be no blanket inclusion or blanket exclusion of signal work. It would appear to be a more reasonable interpretation of the express language and the spirit and intent of the Consent Decree, as well as the reasonable accommodation requirements of the Rehabilitation Act of 1973 as required by 41 C.F.R. 60-741.4, 60-741.5, 60-471.6(d) and 60-741.7.

The failure to utilize this practice violates petitioners' rights of due process and equal protection of the law under the Fifth and Fourteenth Amendments to the Constitution.

IV

CONCLUSION

Petitioners respectfully request this Court to issue a writ of certiorari to the Ninth Circuit Court of Appeals, and review the issues raised herein.

DATED: January 22, 1992

Respectfully submitted,

CHARLES FAIRCHILD
RAY IMBAGLIAZZO
RAUL RODRIGUEZ
NELSON STATOM

Petitioners

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APPENDIX A

FILED

JUL 15 1991

Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEBORAH TAYLOR GOLDEN, et al, Plaintiff v. PACIFIC MARITIME ASSOCIATION, Defendant-Appellee, v. CHARLES FAIRCHILD; RAY IMBAGLIAZZO; RAUL RODRIGUEZ; NELSON STATOM, as agents of the Stephans Class, et al Plaintiff-Intervenors Appellants	) CA No. 89-55775) DC No. CV-80-4770-RMT))MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, Judge, Presiding

Argued and Submitted June 7, 1991
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: FLETCHER and CANBY, Circuit Judges, and REED,** District Judge

Four injured longshoreworkers appeal the district court's order denying their motion for an Order Re Contempt in the consent decree settling Golden v. Pacific Maritime Ass'n et al Civ. No. 80-4770-RMT (C.D.Cal.). We affirm.

BACKGROUND

Appellants are injured longshoreworkers employed at the Los Angeles-Long Beach Port, and are, therefore, members of the intervening Stephans subclass in Golden, who claimed discrimination in the hiring of injured longshoreworkers and clerks at the Port. The consent decree provided for the establishment of a Joint Port Labor Relations Committee ("JPLRC"), one of the duties of which was to implement the

** The Honorable Edward C. Reed, Jr., Chief Judge, United States District Court for the District of Nevada, sitting by designation.

consent decree's provisions for equitable assignment of injured longshoreworkers to light duty work. Paragraph 47 of the decree provides that "based on the physician's report, it shall specify types of work that the injured longshore person need not perform."

Pursuant to the consent decree, the JPLRC designated four types of jobs for which an injured longshoreworker may be determined to be eligible. The JPLRC later formulated the policy which is the subject of this appeal: "If a longshoreworker can perform clerks' work, he can perform signal work. . . . [and] a longshoreworker on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs."

The impact of that rule was not felt for more than three years because the physician designated to determine the capability of injured longshoreworkers freely

dispensed "no front/no signal" exemptions from that policy. After that practice was called into question, the JPLRC "revitalized" its initial policy, ruling that, since clerk work and signal work were physically equivalent, there could no longer be individually-based exemptions from the policy that injured longshoreworkers could not be dispatched to clerk work if they had refused signal work.

Appellants here are injured longshoreworkers who had been granted "no front/no signal" exemptions, and, as a result of this "revitalization" were deprived of the option of turning down signal work to take clerk work. They moved the district court for an order holding the JPLRC in contempt of the consent decree, arguing that clerk work is different from signal work, that enforcing the disputed policy contradicts their earlier medical certification

exempting them from the policy, and that the policy was enforced in bad faith.

The district court held a six-day evidentiary hearing, and concluded that clerk and signal work were substantially similar, and that there was no evidence that the JPLRC had acted in bad faith. This appeal followed.

DISCUSSION

In the district court, appellants had the burden of establishing civil contempt by clear and convincing evidence. Vertex Distrib. Co. v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982). We review the district court's factual findings for clear error. Kemmis v. McGoldrick, 767 F.2d 594, 597 (9th Cir. 1985). Although questions of interpretation of the consent decree are reviewed de novo, where, as here, the district court has been closely involved in overseeing its formation and

implementation, that de novo review is tempered by deference to the district court's interpretation. Vertex, 689 F.2d at 893.

1. Jurisdiction

The district court had subject matter jurisdiction to enter and enforce this consent decree in spite of the fact that section 503 of the Rehabilitation Act of 1973, the primary asserted basis of the Stephans class for intervention, does not provide a private cause of action. The Stephans class also asserted claims such as violation of 42 U.S.C. section 1985(3), third party beneficiary rights to a federal contract, and conspiracy to defraud the class of its rights under governing Collective Bargaining Agreements. These charges present federal questions providing subject matter jurisdiction in the district court to address these claims, or to enter and

enforce a consent decree settling them.

2. Need to seek court approval to alter consent decree

Parties to this consent decree are not required to submit any dispute regarding the interpretation of the decree to the district court for approval prior to the implementation of a disputed rule. Paragraphs 16 and 30 of the decree are not to the contrary. Paragraph 16 requires that disputes which cannot be resolved by the parties "shall be submitted to the court." It does not require that they be submitted to the court before a disputed policy is implemented. Such an interpretation would be far too cumbersome. Paragraph 16 provides the exact procedure which has occurred here. Appellants dispute a policy of the JPLRC, and they have submitted that dispute to the court for resolution.

Paragraph 30 permits defendants (in the underlying Golden action) to move to set aside the decree, in whole or in part, if attempting to meet its goals is unduly burdensome on them. This paragraph applies, by its terms, only to defendants, who are not complaining here. Further, it does not require pre-implementation court approval of disputed policies.

3. Individual assessment v. categorical policy

After extensive inquiry the district court found that, in spite of variation within the two categories, clerk and signal work are substantially equivalent in terms of physical demands on workers. That finding is not clearly erroneous, and we affirm it.

The consent decree does not require that injured longshoreworkers be assigned to individual jobs within the categories

of either signal or clerk work. Paragraph 47 of the consent decree uses expressly categorical language in providing that "the [JPLRC] . . . shall specify the types of work that the longshoreworker need not perform." (emphasis added). That categorical provision accommodates the practical difficulties that would be involved in requiring dispatch to individual jobs within a particular type of work, where "signal and clerk work often changes during a single shift . . . [and] each job type varies by employer and terminal." Findings of Fact and Conclusions of Law, 5/30/89, at 18, ¶ 46.

4. Bad faith

The district court found that there was no evidence that JPLRC had implemented its policy in bad faith. That finding is not clearly erroneous. Appellants offer no independent evidence of bad faith, other

than to repeat their legal and factual argument addressed above, asserting that they demonstrate bad faith as well as error. That is not enough to establish bad faith.

CONCLUSION

Appellants have clearly failed to establish by clear and convincing evidence that defendants are in contempt of the decree. The judgment of the district court denying the contempt motion of the Stephans appellants is

AFFIRMED.

APPENDIX B

FILED

OCT 24 1991

Cathy A. Catterson, Clerk
U.S. Court of Appeals

DEBORAH TAYLOR GOLDEN, et al.,

Plaintiff,

v.

PACIFIC MARITIME ASSOCIATION, et al.,

Defendant-Appellee,

v.

JACQUELINE HANNA; SANDRA JONES; KAREN SCHAFFER; SANDRA ROBINSON; JOYCELYN HAMPTON; MYRA SOMEERS; DOROTHY SYKES; ELIZABETH GRAVETT,

Plaintiff-Intervenors Appellants.

) CA No. 89-55775
) DC No. CV-80-4770-RMT
) ORDER

BEFORE: FLETCHER AND CANBY, CIRCUIT JUDGES AND REED,* DISTRICT JUDGE

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

* Honorable Edward C. Reed, Jr., Chief United States District Judge for the District of Nevada, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

ENTERED

MAY 31 1989

Clerk, U.S.Dist.Court
Central District of
California
By (init.) Deputy

FILED

MAY 30 1989

Clerk, U.S.Dist.Court
Central District of
California
By (init.) Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBORAH TAYLOR GOLDEN, et al., Plaintiffs, vs. PACIFIC MARITIME ASSOCIATION, et al., Defendants.	No. CV 80-4770-RMT ORDER
ROY H. STEPHANS, et al., Plaintiffs in Intervention.	

The above-captioned matter came on for hearing before the undersigned following this court's issuance of an Order Re Contempt and Setting Evidentiary Hearing.

After receiving both testimony and documentary evidence and arguments of

counsel, the court orders that the Order Re Contempt be dismissed.

Dated: May 30, 1989

/s/
ROBERT M. TAKASUGI
United States District Judge

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..x. Mld copy Ptys
..x. Mld Notice Ptys
..C. JS-8

May 31 1989

APPENDIX D

local members who desired to transfer and who were capable of performing marine clerk work.

The dispute over registration resulted in arbitration and a decision by the coast arbitrator, Mr. Sam Kagel ("Kagel"). The Kagel decision provided instructions for the hiring of new marine clerks: ...

... members to protect their interests. Treatment under Rule 23(b)(1) and (2) is the only practical alternative to avoid a multiplicity of suits, provide common binding adjudications, and prevent inconsistent or varying adjudications between the parties.

C. STEPHANS CLASS

Plaintiffs-in-intervention Stephans et al. have challenged defendants' policies and practices concerning the handicapped in the assignment of work at the Port. The putative class consists of at least 100 injured longshore workers which would, in light of the Golden and Bower classes, make joinder impractical.

The individual plaintiffs-in-interventions have put forth an all-encompassing attack against defendants for unequal employment practices and breach of the duty of fair representation in providing reasonable accommondation to the injured longshore

workers. The industry-wide attack raises common questions of law and fact which are typical to the putative class, especially in light of the employment practices governed by the collective bargaining agreement. The situation of each injured longshore worker is identical as to the issues raised and the relief requested. Where a group of employees and unions operate pursuant to a uniform collective bargaining agreement, it is appropriate that a category of workers with common attributes be certified to proceed as a class in attacking the defendants' practices under that agreement.

The named Stephans plaintiffs have an interest in this suit substantially similar to that of the putative class. The individuals have suffered and will suffer the same wrongs as the putative class because of their status as injured longshore workers. Prosecution of this action has been undertaken

vigorously as evidenced by the heated debate during the Stephans' application for a preliminary injunction. There is ample evidence that the suit is noncollusive and that the individual interests of the plaintiffs-in-intervention are not antagonistic to the claims to be asserted on behalf of the class or the relief requested Moreover, counsel for the Stephans group has demonstrated the ability to competently represent the interests of the individual plaintiffs-in-intervention and the putative class. The court finds that the class is adequately represented.

The same principles which apply to the Golden class and the Bower class in maintaining the action pursuant to Rule 23(b)(1), and (2) are equally applicable to the Stephans class. Defendants allegedly have acted and/or refused to act on grounds allegedly applicable to the class, thereby making final injunctive and declaratory relief appropriate to

the class as a whole. The Stephans class is seeking the same limited number of jobs at the Port. If the class is not certified, absent class members face the possibility of being prejudiced in their pursuit of the same limited number of jobs. Adjudication of the individual claims would effectively dispose of the class' interest. Furthermore, if a multitude of individual suits were litigated, defendants could be faced with incompatible standards of conduct especially in light of the Golden and Bower claims for ...

... registered as "B" longshore workers, 31 were women, 78 were black and 180 were Hispanic. The figures presented to this court demonstrate that a commendable racial balance was achieved out of the registration process. The class claims of retaliation are also questionable in that the application deadline for registration was well before the instant suit was filed. Furthermore, there has not been a concrete showing of the number of casual workers who actually applied for "B" class registration as longshore workers. The fraud claims of the class appear to be lacking any foundation. There are difficulties in proving scienter and a reliance interest necessary to sustain a fraud claim. Similarly, the class will have difficulty in attempting to prove selective discrimination.

The proposed consent decree provides for the immediate registration of 38 members of the Bower class who have worked the most hours

in the Port as marine clerks in the past three years. In addition, the next 50 persons registered hereinafter will be members of the Bower class. Although the Bower class has not been afforded the entire relief which it requested, i.e., the registration of the whole class, the provisions in the consent decree appear more than adequate considering the finite number of jobs available and the relative strengths of the claims which the class asserts.

3. STRENGTHS OF THE STEPHANS CLASS CLAIMS

The Stephans class has alleged claims under section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(1); violations of 42 U.S.C. § 1985(3); breach of the duty of fair representation; violations of California Government Code Section 12940; and, conspiracy to defraud them of their rights under the collective bargaining agreement. All of the above claims essentially arise out of alleged unequal treatment for the handicapped

longshoremen and the failure by the defendants to make reasonable accommodations for the handicapped at the Port.

In the first two causes of action, the Stephans class has asserted rights under the Rehabilitation Act of 1973. If meritorious on these claims, the Stephans group would appear to be entitled to the most complete relief attainable. However, the recent Ninth Circuit decision of Fisher v. City of Tucson, supra, has substantially altered the relief which the Stephans group seeks. In Fisher, the Ninth circuit held that there is no private cause of action under section 503 of the Rehabilitation Act of 1973. Thus, the Stephans class is foreclosed from asserting a cause of action under the act. If the litigation continued, these claims would have to be dismissed and the class would have to litigate its other theories which do not appear to afford them the same type of relief.

The Stephans class claim under 41 U.S.C. § 1985 raised novel issues and would be matters of first impression. The class complains that the defendants have conspired to deny the class their due process rights under the fifth and fourteenth amendments. In addition, the class claims the defendants have conspired to deny the class its civil rights under the Rehabilitation Act of 1973 and California Government Code Section 12940. The class has not articulated what due process rights have been violated. Notwithstanding the failure to address what due process rights have been violated, section 1985 does not afford due process protection. The class would have to advance its arguments under the rights protected by the Rehabilitation Act and California Government Code Section 12940. It is unclear whether the class could succeed in advancing what claims it has under the Rehabilitation Act as a "right" protected by section 1985.

Actions involving Title VII violations may not be brought under Section 1985 because of the possible erosion of the administrative requirements under Title VII and the inconsistent remedies provided by each statutory scheme. See Great American Sav. & Loan Assn. v. Novotny, 442 U.S. 366 (1979). In Fisher, the court was also concerned with the administrative procedure and the role of the Department of Labor when it declined to hold that a private cause of action under section 503 of the Rehabilitation Act exists. The right upon which the class appears to have a cause of action is under California Government Code Section 12940 which prohibits discrimination because of physical condition. A state-created civil right may be relied upon by an individual bringing action under section 1985. Life Insurance Co. of North American v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979). However, the class would still be faced with problems

of proof of conspiracy and proof of class-based invidiously discriminatory animus behind the conspirators' action. See Griffen v. Brekenridge, 403 U.S. 88, 102 (1971); DeSantis v. Pacific Tel. & Tel. Co., Inc., supra, 608 F.2d at 332-33. Moreover, in view of the practices at the Port and the somewhat preferential treatment given to the handicapped longshore workers in accordance with the collective bargaining agreement, the Stephans class claims under 1985 and California Government Code Section 12940 would raise uncertainties as to their likelihood of prevailing at trial. See discussion infra.

The class claims involving the breach of the duty of fair representation allege that L-13 and the ILWU have failed to fairly and honestly represent the interests of the class in failing to take action to protect the employment conditions of the handicapped longshore workers. The legal principles relevant

to the Bower class' fair representation claim are equally applicable to the Stephans class claim. The Stephans class will have to prove that the conduct of L-13 and the ILWU in negotiating the collective bargaining agreement and implementing the provisions thereof was arbitrary or undertaken in bad faith. In regard to the testing procedure for the 108 transferees, the Stephans class will be required to establish that the testing criteria was arbitrary or utilized in bad faith. The PCLCD provides some preferential treatment to longshore workers who are either old or disabled. Section 3.133 provides preferential assignment of "dock work to longshore workers who are old or disabled. Section 20.533 provides that men who refuse work opportunity will not be given available credit for the PGP except dock preference men who are exempt from work on ship (disabled longshore workers). Aside from the PCLCD, L-13 has provided

priority to the injured longshore worker for the "casualty board" and "swamper board" which consist of light work at the Port. In addition past practices have allowed injured longshore workers to apply for marine clerks' work when the registered marine clerk force has been depleted for any given day. Further, the injured longshore workers have been given the right to draw benefits from the PGP fund on an equal basis with nonhandicapped longshore workers.

The problems which brought the Stephans class into this suit involved the transfer of the 108 longshore workers into L-63. Before the Kagel decision, L-13 had advocated the transfer of longshore workers to L-63 with emphasis on seniority. After the Kagel decision a test was given to those desiring to transfer. Part of the criteria for the test gave injured longshore workers who had worked as a clerk 1/2 point for each month worked as a clerk (while injured) up to a maximus of

five points. At the time of the preliminary injunction, this court was concerned with whether that type of credit was sufficient affirmative action under the Rehabilitation Act of 1973 and not with whether or not the testing criteria was discriminatory, arbitrary or made in bad faith. Approximately 70 handicapped longshore workers applied for the transfer to L-63. Out of those applicants, approximately 20 handicapped longshore workers were selected for transfer. The extra credit which the handicapped longshore workers received appeared to enhance their chances of transfer and discount the other criteria of being able to perform <u>all</u> the tasks required of a marine clerk. The Stephans class' probability of succeeding on the merits in its unfair representation claim is highly speculative. It appears that without its claims under the Rehabilitation Act, the Stephans class' position in this lawsuit has diminished

substantially.

Under the proposed consent decree, this court is informed that 26 handicapped longshore workers will be among the transfers to L-63. The "casualty board" has apparently been revamped to include more jobs which are capable of being performed by handicapped longshore workers. If the consent decree is approved the "casualty board" cannot be bargained away by the parties in the collective bargaining process. [NOT LEGIBLE]
element of the conset decree is the establishment of an independent physician to examine employees for a determination as to whether employees are truly disabled so that those who are not truly disabled may not gain access to those jobs guaranteed to the most needy. This provision is important in light of the allegations that employees are being certified for handicapped longshore positions when they are truly not handicapped

individuals. Finally, if handicapped individuals refuse any job which they are unable to perform, they will not be denied PGP funds.

In view of the state of the law and the claims which the Stephans class advances, this court does not believe that the proposed settlement is unfair to this class. The class has to realistically evaluate its chance of success since the Fisher decision and the high financial costs involved if the class proceeded any further in this action on claims which appear highly speculative. A settlement by its very nature is a compromise which must be viewed in light of all competing interests.

E. PRESENCE OF COLLUSION

There is no evidence to support a claim of collusion between the parties. Each class of plaintiffs and the defendants have taken adverse positions since the inception of this suit. The only real agreement by the parties is the recognition that there is a need to

finalize the instant matter so that the flow of commerce may continue in an efficient manner at the Port. ...

... negotiations free from any collusion. The court congratulates counsel for their patience and ingenuity in drafting a settlement addressing the problems facing the workforce at the Port.

After a thorough review of the proposed consent decree and the objections thereto, this court is convinced that the settlement is fair, reasonable and adequate. There are a limited number of highly desirable jobs for which several groups are competing. Each group has a separate interest to pursue. As a practical matter, no one group can be completely satisfied. Throughout these proceedings, it appears that the class groups lose sight of the fact that their real adversary is the economy of this country which is experiencing a severe depression with widespread unemployment. This court is confident that when the economy improves, the working conditions at the Port will also improve.

DATED: MAY 20, 1983.

/s/
ROBERT M. TAKASUGI
United states District Judge

APPENDIX F

29 U.S.C. §793(a) provides:

Any Contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and non-personal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations

within ninety days after September 26, 1973.

29 U.S.C. §793(b) provides:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

APPENDIX G

§ 60-741.4 Affirmative action clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract.).

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

(a) The contractor will not discrimiate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment

practices such as the following: Employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, provided by or through the contracting

officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ an advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) the contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provisions of this clause in every subcontract or purchase order of $2,500 or more unless exempted by rules, regulations,

or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for non-compliance.

APPENDIX H

§ 60-741.5 Applicability of the affirmative action program requirement.

(a) Within 120 days of the commencement of a contract every government contractor or subcontractor holding a contract of $50,000 or more and having 50 or more employees shall prepare and maintain an affirmative action program at each establishment which shall set forth the contractor's policies, practices and procedures in accordance with §60-741.6 of this part. This program may be integrated into or kept separate from other affirmative action programs of the contractor. Contractors presently holding government contracts shall update their affirmative action programs within 120 days of the effective date of this part.

(b) The affirmative action program shall be reviewed and updated annually. If there are any significant changes in

procedures, rights or benefits as a result of the annual updating, those changes shall be communicated to employees and applicants for employment.

(c)(1) The contractor shall invite all applicants and employees who believe themselves covered by the Act and who wish to benefit under the affirmative action program to identify themselves to the contractor. The invitation shall state that the information is voluntarily provided, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment and that it will be used only in accordance with the Act and the regulations in this part. If an applicant or employee so identifies himself or herself the contractor should also seek the advice of the applicant or employee regarding proper placement and appropriate acommodation.

(An acceptable form for such an invitation is set forth in Appendix B of this part.)

(2) Nothing in this section shall preclude an employee from informing a contractor at any future time of his or her desire to benefit under the program.

(3) Nothing in this section shall relieve a contractor of its obligation to take affirmative action with respect to those applicants or employees of whose handicap the contractor has action knowledge: Provided, That the contractor is not obligated to search the medical files of any applicant or employee to determine the existence of a handicap.

(4) Nothing in this section shall relieve a contractor from liability for discrimination under the Act.

(d) The full affirmative action program shall be available for inspection to any employee or applicant for employment

upon request. The location and hours during which the program may be obtained shall be posted at each facility.

APPENDIX I

(d) Accomodation to physical and mental limitations of employees. A contractor must make a reasonable accomodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accomodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors among others may be considered: (1) Business necessity and (2) financial cost and expenses.

APPENDIX J

§ 60-741.7 Determination of handicap.

(a) Any handicapped individual filing a complaint with the Director under this part shall submit with his or her complaint a signed statement specifying the handicapping impairment or situation (see § 60-741.2 definition of "handicapped individual"). If the Director determines that further documentation is necessary, he or she may require the complainant to provide additional information.

(b) Any contractor requiring a determination of an applicant's or employee's handicap may require the applicant or employee to provide medical documentation of the impairment or, in the alternative, may require the applicant or employee to undergo a medical examination at the contractor's expense.

(c) Any determination of handicap required pursuant to paragraph (b) of this

section must meet the requirements of § 60-741.5(c) and must be for the purpose of affirmative action and proper job placement. Information obtained therefrom shall not be used to exclude or otherwise limit the employment opportunities of qualified handicapped individuals.

(d) All medical documentation required under this section shall be based upon the American Medical Association Guides to the Evaluation of Permanent Impairment, provided that the Guides shall be used only to determine the existence of impairment without regard to the degreee of impairment.

[43 FR 49276, Oct. 20, 1978; 43 FR 51402, Nov. 3, 1978]

No. 91-1218

Supreme Court, U.S.
FILED
MAR 24 1992
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

CHARLES FAIRCHILD, et al.,
Petitioners,

v.

PACIFIC MARITIME ASSOCIATION; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court clearly erred in finding that clerk and signal work were substantially equivalent in terms of physical requirements, and that the use of these categories of work by the respondents' Joint Port Labor Relations Committee ("JPLRC") complied with the terms of a 1983 consent decree?

2. Whether the district court had subject matter jurisdiction in 1983, to resolve claims brought by various injured longshoreworkers pursuant to 42 U.S.C. § 1985(3), third party beneficiary claims under the Longshore Pacific Maritime Labor Agreement, and conspiracy to defraud longshoreworkers under said labor agreement?

LIST OF PARTIES

Petitioners:	Charles Fairchild Ray Imbagliazzo Raul Rodriquez Nelson Statom
Respondents:	Pacific Maritime Association
	International Longshoremen's and Warehousemen's Union
	International Longshoremen's and Warehousemen's Union, Local 13
	International Longshoremen's and Warehousemen's Union, Local 63

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. A), the order denying the petition for rehearing (Pet.App. B), and the opinion of the district court (Pet.App. C) are unreported.

JURISDICTION

The memorandum opinion of the court of appeals was filed on July 15, 1991. The order of the court of appeals denying the petition for rehearing was filed on October 24, 1991. The petition for a writ of certiorari was filed on January 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE[1]

A. Introduction

Petitioners are four longshoreworkers who are members of one of three classes whose claims were collectively resolved in a 1983 consent decree entitled *Golden v. Pacific Maritime Ass'n et al.* Civ. No. 80-4770-RMT (C.D. Cal.). In 1988, petitioners sought an order re contempt from the district court, which was denied. They now seek a writ of certiorari from the Ninth Circuit's decision affirming the district court's order.

Specifically, petitioners are members of the intervening "Stephans" subclass in *Golden*, who claimed discrimination in the hiring of injured longshoreworkers and clerks at the Los Angeles-Long Beach Port (hereinafter, "Port"). The consent decree provided, *inter alia*, for the establishment and implementation of a dispatch system to provide for equitable assignment of injured longshoreworkers to light duty work. Petitioners allege, in substance, that respondents Pacific Maritime Association (hereinafter, "PMA"), International Longshoremen's and Warehousemen's Union (hereinafter, "ILWU"), ILWU Local 13 and ILWU Local 63 (hereinafter collectively referred to as "respondents") were in contempt of the consent decree because the Joint Port Labor Relations Committee (hereinafter, "JPLRC") (which administers labor relations in the Port) formulated and enforced a policy which affected them. This policy reads:

---

[1] Petitioners' Statement of the Case includes numerous factual allegations with few citations to the record (e.g. the specific injuries of each petitioner at pp. 17-26); thus, it is difficult to determine if the facts presented are accurate or supported by evidence below.

The material facts in this case are set forth in this brief and in the Memorandum of the court of appeals and the Findings of Fact of the district court, Pet.App. A and D, respectively, and are incorporated herein by reference. Respondents disagree with the statements of fact in the petition to the extent that they conflict with the findings of the courts below, are not supported by the record below, and/or are not material.

Respondents also disagree with petitioners' misstatements of the law which are discussed in the argument below.

> "If a longshoreworker can perform clerks' work, he can perform signal work. . . . [and] a longshoreworker on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs." (Pet.App. D-24, A-3)

After litigating this issue to an unsuccessful result in 1989 before the district court, the petitioners changed their tactics and sought, again unsuccessfully, to convince the Ninth Circuit Court of Appeals that the district court never had jurisdiction of the class' claim. (Pet.App. D, E, A-6).

B. The Respondents

PMA is an employer's association of shipping lines, terminal operators and stevedore companies on the West Coast. The union respondents are the collective bargaining representatives for employees performing marine clerk and longshore work for the PMA stevedore and terminal companies. ILWU Local 13 represents longshoreworkers and ILWU Local 63 represents clerks in the Port.

C. The Consent Decree

With respect to the Stephans class, the consent decree established a process whereby truly injured longshoreworkers could be assigned light work. (Pet.App. D-18) To this end, the consent decree established a Casualty Board for dispatch of injured longshoreworkers to light jobs, and vested in the JPLRC the discretion to determine, based upon a physician's report, the types of work that injured longshoreworkers are able to or need not perform. (Pet.App. E-86 through E-91, D-27)

Paragraphs 41 through 50 of the consent decree cover the matters applicable to the Stephans class. Paragraph 44 of the consent decree provides that injured longshoreworkers are to be dispatched exclusively from the Casualty Board where all light duty longshore jobs are consolidated, and all such work is to be "dispatched in accordance with local Dispatch Rules." Pursuant to that paragraph and the local Dispatch Rules, extra marine clerk work is assigned to the Casualty Board when said board is the "low board", i.e. the board with the lowest average hours

worked on a given day. (Pet.App. D-30, D-31) All extra clerk work is assigned first to the low board and thereafter to other boards in the order of lowest average hours. (Pet.App. D-31)

Under paragraph 45, the JPLRC approves the check-in rights of injured longshoreworkers based upon a medical report of a physician designated by it. (Pet.App. D-21, D-22) The JPLRC is guided by paragraph 47 to determine eligibility on the Casualty Board:

> "In making a determination that an injured longshore person be certified to check-in on the casualty board, the Joint Port Labor Relations Committee shall further consider whether an injured longshore person would be unable to perform certain work dispatched from the Casualty Board. If the Committee so determines, based upon the physician's report, it shall specify the *types* of work that the injured longshore person need not perform. If such a determination is made, it shall become a part of the certification of that longshore person to the Casualty Board and the person so certified may thereafter, so long as he or she remains so certified, refuse any such work offered that would be in contravention of the certification. Such refusal of work shall not be considered as grounds for denying benefits to a injured longshore person under the Pay Guarantee Plan or for any penalty whatsoever." (Emphasis added.)

D. The Casualty Board

In April 1983, pursuant to the consent decree, the JPLRC designated four types of jobs for the Casualty Board for which an injured longshoreworker may be determined to be eligible, including:

> "*Front Jobs*: Involves hooking and unhooking loads on the dock. Requires some standing, some bending, and a minimal amount of lifting. . . .

> *Signal Jobs*: This job requires standing, however, no physical work. *If a longshoreworker can perform clerks' work, he can perform signal work.*
>
> . . .
>
> *Clerks Jobs*: Requires standing, walking and a minimal amount of bending. *The committee agreed that a longshoreworker on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs.*" (Pet.App. D-27, D-28)

The requirement that "a longshoreman on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs" was made known to the court at the time the consent decree was approved; furthermore, the requirement conformed to traditional dispatch rules that longshoreworkers who reject available work in their general job or board category are ineligible from receiving extra clerk work for that day. (Pet.App. D-29)

The impact of this rule was not felt for more than three years because Dr. Michael Wald, the physician designated to determine the capability of injured longshoreworkers, had limited familiarity with front, signal and clerk work, and freely dispensed "no front/no signal" exemptions from that policy. (Pet.App. D-34, D-36, A-3, A-4)

In about the summer of 1986, the JPLRC received an increasing number of complaints about the fairness of having up to 85 Casualty Board members receive first choice of extra clerk work under a "no front/no signal" exemption when clerk work in general involves the same physical requirements as signal work, and about abuses by individuals on the Casualty Board who had "no front/no signal" exemptions yet were seen performing activities inconsistent with the supposed disabilities. (Pet.App. D-36, D-37)

The JPLRC thoroughly reviewed this issue. It conducted extensive tours of the Port area with Dr. Wald, who studied the signal and clerk jobs in detail with the specific purpose of comparing the two types of work. Based on his greater understanding, Dr. Wald rendered his opinion that signal work is, in

general, no more physically demanding than clerk work, but that front jobs are more strenuous and exemptions from such work should be granted where appropriate. Based on this review and the informed opinions and experience of the members of the JPLRC, the JPLRC "revitalized" its initial policy effective June 15, 1987, with respect to signal and clerk work. It decided that since clerk work and signal work were physically equivalent, there could no longer be individually-based exemptions from the policy that injured longshoreworkers could not be dispatched to clerk work if they had refused signal work. (Pet.App. A-4, D-39)

E. Decisions Below

Petitioners are four injured longshoreworkers who in 1983 had been granted "no front/no signal" exemptions, but as a result of the "revitalization" were denied the option of turning down signal work in order to take clerk work exclusively. They moved the district court for an order holding the JPLRC in contempt of the consent decree, arguing, *inter alia*, that clerk work is different from signal work and that the JPLRC acted in bad faith. The district court held a six-day evidentiary hearing, and denied the motion for contempt, concluding that clerk and signal work were substantially similar, and that there was no evidence that the JPLRC had acted in bad faith. (Pet.App. A-4, A-5, D-52)

On appeal, petitioners, for the first time, contested the district court's original jurisdiction as well as its denial of their motion for contempt. The court of appeals affirmed the district court decision. It concluded that in spite of the fact that the primary basis for intervention, Section 503 of the Rehabilitation Act of 1973, does not provide a private cause of action, the other claims made by the Stephans class did present federal questions providing subject matter jurisdiction. In addition, it held that the district court's findings—that clerk and signal work are substantially equivalent in terms of physical demands on workers, and that the JPLRC did not act in bad faith—were not clearly erroneous. It further concluded that the consent decree does not require that injured longshoreworkers be assigned to individual jobs within the categories of either signal or clerk work, and that petitioners failed

to establish by clear and convincing evidence that respondents were in contempt of the decree. (Pet.App. A-8, A-10)

ARGUMENT

A. There Is No Reason To Grant The Writ

The court of appeals correctly applied established legal principles to the facts of this case. Its decision does not conflict with decisions of this Court or of other courts of appeals. Nor does its decision present special or important federal questions which have not been, but should be, settled by this Court.

1. The Ninth Circuit's Decision Does Not Conflict With Decisions Of This Court Or Of Other Courts Of Appeals

The only conflict in decisions asserted by petitioners is that the court of appeals decision in this case conflicts with a prior decision by the *same* court of appeals. (Pet. 30-42)[2] Petitioners' assertion not only is erroneous, but also does not constitute an appropriate ground for granting a petition for a writ of certiorari under Rule 10.1. The guidelines in Rule 10.1 indicate that petitions may be granted when "a court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." (Rule 10.1(a)) A conflict between decisions rendered by the same court of appeals is ordinarily not a sufficient basis for granting a writ of certiorari. See *Davis v. United States*, 417 U.S. 333, 340, 41 L.Ed.2d 109, 115 (1974) (Court denied petition for certiorari where the conflict was intracircuit); *Wisniewski v. United States*, 353 U.S. 901, 1 L.Ed.2d 658 (1957) (Court rejected a certificate from a court of appeals involving conflicting decisions by different panels, saying that "doubt about the respect to be accorded to a different panel should not be the occasion for invoking so exceptional a jurisdiction of the Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties.")

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[2] While petitioners argue that the court of appeals' decision conflicts with decisions of other courts of appeals, none are cited.

Moreover, petitioners' allegation of an intracircuit conflict is simply a false statement. Since at least 1981, in *Fisher v. City of Tucson*, 633 F.2d 861 (9th Cir. 1981), the Ninth Circuit has held that Section 503 of the Rehabilitation Act of 1973 does not provide a private cause of action. Nothing in these proceedings suggests otherwise. Contrary to petitioners' allegations, the court of appeals recognized its prior holding, but pointed out that there were *other* grounds providing subject matter jurisdiction over the Stephans class in this case.

> "[t]he Stephans class also asserted claims such as violation of 42 U.S.C. section 1985(3), third party beneficiary rights to a federal contract, and conspiracy to defraud the class of its rights under governing Collective Bargaining Agreements." (Pet.App. A-6)

The court of appeals found that "[t]hese charges present federal questions providing subject matter jurisdiction in the district court to address these claims, or to enter and enforce a consent decree settling them." (Pet.App. A-6, A-7)[3] Petitioners ignore these other claims and misconstrue the basis for assertion of jurisdiction.

Thus, a writ of certiorari should not be granted both because a conflict between decisions of the same court of appeals is an insufficient basis for granting a writ of certiorari and because there is in fact no conflict in the decisions of the court of appeals. Moreover, the district court clearly had subject matter jurisdiction in this case.

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[3] The district court also noted that the Stephans class had alleged claims other than Section 503, including "violations of 42 U.S.C. § 1985(3); breach of the duty of fair representation; violations of California Government Code Section 12940; and, conspiracy to defraud them of their rights under the collective bargaining agreement." (Pet.App. E-110)

2. The Court Of Appeals' Decision Does Not Present An Important Federal Question Which Has Not Been, But Should Be, Settled By This Court

Petitioners claim that the court of appeals erred in concluding that respondents were not in contempt of the consent decree. (Pet. 51, 54-55; Pet.App. A-8,A-9)[4] The court of appeals followed established standards in reviewing the district court's factual findings and resolving questions of interpretation of the consent decree. *Kemmis v. McGoldrick*, 767 F.2d 594, 597 (9th Cir. 1985); *Vertex Distrib. Co. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). (Pet.App. A-5, A-6)

The court of appeals decision concerning the particular decree in issue does not present an important federal question. The decision turns upon the specific facts of this case, an overview of which is provided in section D, above, and section B, below; and its impact is limited to the particular parties. This case, in essence, involves a dispute initiated by four longshoremen who disagree with the interpretation by both the court of appeals and the district court of the terms of a consent decree and with their analysis of the particular facts involved. For these reasons, further review is unwarranted. See *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Texas v. Mead*, 465 U.S. 1041 (1984).

B. Clerk And Signal Work Were Substantially Equivalent In Terms Of Physical Requirements, And The Use Of These Categories Of Work By The JPLRC Complied With The Consent Decree

Petitioners argue that there are many differences in physical requirements between and within the categories of signal and

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[4] Petitioners also assert that respondents violated the Rehabilitation Act of 1973. (Pet. 51, 54-55) However, their reliance on the Rehabilitation Act is again misplaced. Petitioners in the current matter filed a motion for contempt of the consent decree in the district court. (Pet.App. D-24) Thus, the only issue presented was whether respondents were in contempt of the decree.

clerk work and that the consent decree requires that injured longshoreworkers be assigned to individual jobs within the categories of either signal or clerk work. The district court conducted an extensive evidentiary hearing and found that, in spite of variation within the two categories, clerk and signal work are substantially equivalent in terms of physical demands on workers. (Pet.App. D-40) The court noted, among other things, that "[b]oth signal and clerk work involve a variety of different tasks and physical movements depending on the employers, facility, and stage of operations." (Pet.App. D-41) "In general, the function of a signalman is to aid in the safe and efficient movement of cargo by giving hand and/or radio signals to equipment operators. During a single shift, a signalman can and does perform at least three basic tasks: 'blindside' signaling, which is performed in a jeep with a radio; signaling against the transtainer crane, in which the signalman can and often does use or have access to a vehicle; and signaling against the hammer-head crane, in which a signalman works on his feet." (Pet.App. D-41, D-42) Moreover, signal work does not require continuous standing for long periods of time, since a signalman gets to relax for 15 to 20 minutes at least five or six times during a shift during the "coning off period" when the hammer-head crane is not working or when the transtainer moves to another row of cranes. (Pet.App. D-41, D-42) Signal work of any variety also does not require prolonged or frequent hyperextension of the head and neck; and signalworkers are not required to use any specific forms of hand signals. Nothing prohibits signalworkers from using signals that accommodate a physical disability. (Pet.App. D-42, D-43)

Clerk work entails substantially similar physical requirements. Clerks "work for significant periods of time on their feet and do a good deal of walking and standing in searching for containers and verifying their seal and container numbers." (Pet.App. D-43, D-44) They "extend their head and neck when checking container numbers on containers stacked three or four high in rows roughly two to three feet apart. In verifying container seals and handing documentation to UTR drivers, these clerks must elevate their hand and arm at least shoulder level and sometimes higher." (Pet.App. D-44) Based on his tour of the Port area and observations of signalmen and clerks, Dr. Michael Wald, an expert in

occupational medicine and disability evaluations and the designated doctor for the Casualty Board, concluded that "signal work is, in general, no more physically demanding than clerk work." (Pet.App. D-39) The district court evaluated all of the evidence presented and found that "signal work and clerks work involve substantially the same physical requirements in terms of walking, standing, raising of head and use of arms." (Pet.App. D-44) The court of appeals affirmed the district court's findings. (Pet.App. A-8)

The court of appeals further held that the consent decree does not require that injured longshoreworkers be assigned to individual jobs within the categories of either signal or clerk work. (Pet.App. A-8, A-9) It relied upon the use of expressly categorical language in paragraph 47 of the consent decree:

> "the [JPLRC]—shall specify the *types* of work that the longshoreworker need not perform." (emphasis added) (Pet.App. E-90, A-9)

The consent decree does not provide for making distinctions within the clerk category and within the signal category, but rather specifically states that the JPLRC determines which "*types* of work" the injured longshoreworker need not perform. (Pet.App. D-23, D-24) As the court of appeals reasoned, "[t]hat categorical provision accommodates the practical difficulties that would be involved in requiring dispatch to individual jobs within a particular *type* of work, where 'signal and clerk work often changes during a single shift . . . [and] each job type varies by employer and terminal.'" (Pet.App. A-9)

In view of the right of the JPLRC, pursuant to the consent decree, to determine the categories or types of work which injured longshoreworkers need not perform, and the evidence supporting the similarity of physical requirements for clerk and signal work, the courts below did not clearly err in concluding that the JPLRC fully complied with the decree.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

ENTERED

MAY 31 1989

Clerk, U.S.Dist.Court
Central District of California
By (init.) Deputy

FILED

May 30 1989

Clerk, U.S.Dist.Court
Central District of California
By (init.) Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBORAH TAYLOR GOLDEN, et al., Plaintiffs, vs. PACIFIC MARITIME ASSOCIATION, et al. Defendants.	No. CV 80-4770-RMT FINDINGS OF FACT AND CONCLUSIONS OF LAW
ROY H. STEPHANS, ET AL. Plaintiffs in Intervention.	

FINDINGS OF FACT

Background

1. On October 27, 1980, plaintiffs in Golden, et al. v. PMA, et al., filed an action alleging that defendants Pacific Maritime Association ("PMA"), International Longshoremen's and Warehousemen's Union

("ILWU"), Local 13, ILWU ("Local 13") and Local 63, ILWU ("Local 63") and others had engaged in discriminatory employment practices against women with respect to longshore and marine clerk jobs in the Port of Los Angeles and Long Beach (the "Port") in violation of Title VII of the Civil Rights Act of 1964.

2. Thereafter, several other plaintiff groups, each with distinct interests, intervened in the action. Among these, plaintiffs-in-intervention Roy H. Stephans, et al. (the "Stephans Class") representing a class of injured longshoreworkers who claimed that the defendants violated their rights under the National Rehabilitation Act of 1973, 28 U.S.C. Section 973, and other statutes, intervened on or about July 1, 1981.

3. After extensive discovery and negotiations, parties entered in a Consent

Decree on November 22, 1982, which the court approved in accordance with its Memorandum Re Fairness of Settlement (the "Memorandum") on or about May 20, 1983.

4. As indicated in the Memorandum, the primary claim of the Stephans Class was that an insufficient number of injured longshoreworkers in Local 13 were among those selected by defendants for transfer to Local 63 as registered marine clerks in the first major clerk registration in several years. Thus, the court noted that "[t]he problems which brought the Stephans Class into this lawsuit involved the transfer of the 108 longshore workers into L-63" (Memorandum p. 39:1-3). As a settlement of this claim, the court further noted that "[u]nder the proposed consent decree, this court is informed that 28 handicapped longshore workers will be among the transfers to L-63." Id. p. 39:24-26. With respect to

the Stephans Class' additional claim that the then-current procedures for dispatching injured longshoreworkers to light duty jobs were inequitable and subject to abuse, the court found that under the terms of the Consent Decree:

> The "casualty board" has apparently been revamped to include more jobs which are capable of being performed by handicapped longshore workers. If the consent decree is approved, the "casualty board" cannot be bargained away by the parties in the collective bargaining process. Another important element of the consent decree is the establishment of an independent physician to examine employees for a determination as to whether employees are truly disabled so that those who are not truly disabled may not gain access to those

jobs guaranteed to the most needy. This provision is important in light of the allegations that employees are being certified for handicapped longshore positions when they are truly not handicapped individuals. Finally, if handicapped individuals refuse any job which they are unable to perform, they will not be denied PGP funds.

In view of the state of the law and the claims which the Stephans class advances, this court does not believe that the proposed settlement is unfair to this class. The class has to realistically evaluate its chance of success since the Fisher decision [Fisher v. City of Tuscon, 663 F.2d 561 (9th Cir. 1981) cert. denied 459 U.S. 881 (1982)] and the high financial costs involved if the class proceeded any further in this

action on claims which appear highly speculative. A settlement by its very nature is a compromise which must be viewed in light of all competing interests.

5. Paragraphs 41 through 51 of the Consent Decree cover the matters applicable to the Stephans Class.

6. Paragraph 42 of the Consent Decree provides that the Stephans Class is entitled to only the relief expressly provided to them in the Decree.

7. In paragraph 43, it is recognized that at the time of the Decree "injured" longshoreworkers were accommodated in one of two ways: they were dispatched to light duty jobs from the "Casualty Board" or, they were dispatched directly to extra marine clerk work.

8. Pursuant to paragraph 44, the procedures for accommodating "injured"

longshoreworkers are thereby revamped and henceforth injured longshoreworkers are to be dispatched exclusively from the Casualty Board where all light duty longshore jobs are now consolidated. In this regard, "all such work on the Casualty Board" is to be "dispatched in accordance with local Dispatch Rules".

9. As for extra marine clerk work, under paragraph 44 it is to be assigned to the Casualty Board only when said board is the 'low board'" on any given day. Thus, the Decree does not entitle injured longshoreworkers to a right of first refusal of clerk jobs except in accordance with the established low board dispatch system.

10. Under paragraph 45, the Joint Port Labor Relations Committee ("Joint Port LRC"), consisting of local employer and union representatives, approves the check-in rights of "injured" longshoreworkers

based upon a medical report of a physician designated by it.

11. In exercising its discretion for determining eligibility on the Casualty Board, the Joint Port LRC is guided by the provisions of paragraph 47 as follows:

> In making a determination that an injured longshore person be certified to check-in on the casualty board, the Joint Port Labor Relations Committee shall further consider whether an injured longshore person would be unable to perform certain work dispatched from the Casualty Board. If the Committee so determines, based upon the physician's report, it shall specify the types of work that the injured longshore person need not perform. If such a determination is made, it shall become a part of the certification of that longshore

person to the Casualty Board and the person so certified may thereafter, so long as he or she remains so certified, refuse any such work offered that would be in contravention of the certification. Such refusal of work shall not be considered as grounds for denying benefits to a injured longshore person under the Pay Guarantee Plan or for any penalty whatsoever.

Thus, under paragraph 47, it is the Joint Port LRC that determines "the types of work" an injured longshoreworker need not perform with impunity based on the designated physician's medical report. The Consent Decree did not provide for attempting to make distinctions within the clerk category and within the signal category, but rather specifically stated that the Committee shall determine which "types of

work" the injured longshoreworker need not perform.

12. Paragraph 48 requires the defendants to designate an employee of the Joint Port LRC as the Affirmative Action Officer to oversee the Casualty Board and to post in their offices and halls all applicable Department of Labor Posters regarding the 1973 Rehabilitation Act.

13. On February 9, 1988, certain members of the Stephans Class (hereinafter called "Plaintiffs") filed a motion for an order holding defendants PMA, ILWU, and Local 13 and 63, in contempt of paragraphs 41 through 51 of the Consent Decree. Plaintiffs allege that defendants violated the Consent Decree when on or about June 15, 1988, the Joint Port LRC determined that any injured longshoreworker who can perform clerk work, can just as well perform signal work, a light duty longshore job, and that

accordingly, no exemptions from first accepting available signal jobs would henceforth be granted. In their moving papers, plaintiffs claim that signal work is more physically demanding than clerk work and that the rules disallowing signal work exemptions is contrary to past medical reports of the designated Casualty Board physician, Dr. Michael Wald. Plaintiffs also contend that the Joint Port LRC so acted in order to eliminate or reduce the employers' costs of accommodating injured longshoreworker and to create more work opportunity for union officers and supporters. In addition, plaintiffs allege in their contempt motion that defendants have failed to designate an affirmative action officer and to post the requisite Rehabilitation Act posters in violation of paragraph 48 of the Consent Decree.

14. On June 7, 1988, the court issued an Order Re Contempt and Setting Evidentiary Hearing wherein it found that defendants had not appointed an affirmative action officer or posted the requisite posters under paragraph 48 of the Consent Decree. The court ordered that defendants take the appropriate steps and certify compliance within twenty (20) days, which defendants timely did. With respect to the issue of clerk work restrictions, the court set an evidentiary hearing "to determine whether the Stephans Class can show by clear and convincing evidence that (1) there is a distinction between the physical requirements of signal and clerk work such that (2) defendants' new policy, of considering the physical requirements to be equivalent, was enacted by the JPLRC in bad faith (i.e., an abuse of discretion by the JPLRC)".

15. An evidentiary hearing was held on August 12 and 15, and September 6, 7, 9 and 14, 1988, concerning the two issues specified in the order. The record evidence presented at hearing indicates the following:

Establishment of the Casualty Board in Accordance with the Consent Decree

16. On or about April 13, 1983, the Joint Port LRC met to discuss modifying the Casualty Board in accordance with the then-proposed Consent Decree weeks before its approval by the Court. It was proposed and soon after agreed that the Casualty Board be assigned four types of jobs which are described in the meeting minutes as follows:

> Front Jobs: Involves hooking and un-hooking loads on the dock. Requires some standing, some bending, and a minimal amount of lifting. (Men on the Casualty Board should not be

required to go aloft to hook and unhook; working aloft should be volunteer.)

Signal Jobs: This job requires standing however, no physical work. If a longshoreworker can perform clerks' work, he can perform signal work.

Winch Driver Jobs: Requires climbing ladders, standing, no lifting, and the skill of operating winches. This is a skilled job, therefore, it is a volunteer job.

Clerks Jobs: Requires standing, walking and a minimal amount of bending. The Committee agreed that a longshoreworker on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs.

17. The Joint Port LRC's finding that an injured longshoreworker who can perform clerks work can also perform signal work

is, consistent with defendants' long standing position which was made known to the court in the Brief of Local 13 in Support of Motion to Approve Proposed Consent Decree, filed on about January 20, 1983, wherein it was stated that "the jobs of 'Dock Signalman', 'Winch Driver', 'Front Man' and 'Dock Man' are no more physically arduous than clerks work, and can be performed with ease by injured and/or disabled longshoremen".

18. The requirement announced at the April 13, 1983, meeting that "a longshoreman on the Casualty Board must accept front and signal jobs prior to accepting clerk jobs" conforms to the traditional dispatch rule applicable to all boards that every class "A" longshoreworker who rejects available work in his or her general job or board category is ineligible from receiving extra clerk work for that day.

19. Also in April, 1983, the Joint Port LRC agreed that a longshoreworker with temporary disabilities may check-in on the Casualty Board for no more than 60 days based on medical certification from his or her own physician. This procedure was designed to expedite admission on the Casualty Board for those who would be on the Board for only a short time. Any additional time on the Casualty Board or requests for further job exemptions requires an examination by the designated neutral doctor. The 60-day period was later converted to three successive 30-day periods.

20. Pursuant to paragraph 44 of the Consent Decree, after April, 1983, extra clerk work was assigned to the Casualty Board only in accordance with the low board system. Under this system, an average of hours worked by working members of each

board is calculated; the boards are then ranked starting with lowest hours first which is the "low board"; all extra clerk jobs along with all excess jobs from the other longshore boards (i.e. "volunteer jobs") are then offered first to members on the low board and thereafter to other boards in the order of lowest average hours. After a certain time period, which through the years has changed from six months to 90 days to now 30 days, all boards start again at zero hours to equalize the opportunity for volunteer and clerk jobs; after the first day in the new time period, the average hours of each board is recalculated and the boards are again ranked.

21. For all times material herein, the Casualty Board has been an extension of the Swamper Board, which is to say that the same light duty longshore jobs

classified as front, winch and signal, are assigned first to the Swamper Board and then automatically to the Casualty Board, regardless of whether the Casualty Board is the low board. Winch jobs require special skills and are therefore, deemed "volunteer jobs" that can be refused without penalty. Because front and signal jobs involve general skills and are assigned automatically to the Swamper and Casualty Boards outside the low board system, these jobs are, as a result, classified as "general jobs" and not "volunteer jobs" for those boards. This means that members of the Swamper and Casualty Boards must accept front or signal jobs, absent a special exemption, or else become ineligible for extra clerk jobs that day as well as PGP benefits in accordance with the local Dispatch Rules described above. It should be noted that longshoreworker on

the Swamper and Casualty Boards, just like their fellow workers on other boards, may still receive extra longshore volunteer jobs within their capabilities even when they reject a general job. Further, all longshoreworker, except those on the Casualty Board, who refuse a general job are also given a "flop" which is a six (6) hour penalty added to their hours; by exempting the Casualty Board from the six (6) hour flop, defendants have ensured that the Casualty Board remains one of the low boards.

22. Pursuant to paragraph 45 of the Consent Decree, some time in 1984, the Joint Port LRC selected Dr. Michael Wald, an expert in occupational medicine and disability evaluations, to serve as the designated doctor for the Casualty Board. Prior to this appointment, Dr. Wald had no familiarity with the nature and physical

requirements of longshore and marine clerk work. Accordingly, Dr. Wald was given a brief tour of the waterfront before making his first evaluation. The tour lasted about one-half-a-day and focused primarily on front jobs vis a vis signal and clerk jobs. Dr. Wald reviewed only a couple of signal jobs and one warehouse clerk job on the tour. A copy of the Consent Decree was given to Dr. Wald upon his appointment.

23. Beginning in 1984, all injured longshoreworkers who wished to check-in on the Casualty Board for more than 60-days, and later 90-days, or who wanted specific exemptions from jobs on the Casualty Board were examined by Dr. Wald. Medical reports of Dr. Wald's examination were sent to the Joint Port LRC for review. It was and is the policy of the Joint Port LRC to adopt the recommendations of Dr. Wald with respect to eligibility on the Casualty Board

and any additional job exemptions.

24. Neither before nor after the Consent Decree were injured Class "B" longshoreworkers, who have limited registration and dispatch rights under the collective bargaining agreement ("PCLCD"), eligible for check-in on the Casualty Board.

25. At all times material herein, injured Class "B" longshoreworkers have received special accommodations similar to those given to Class "A"'s but under a separate system. Any injured Class "B" longshoreworkers with proper medical documentation from a private physician may be granted a "red number" which entitled him or her to first selection, vis a vis other Class "B"'s, of the longshore light duty jobs, i.e., front, winch and signal, as well as extra clerks jobs. An injured Class "B" longshoreworker with a red number

is also entitled to refuse all other jobs without penalty, including the loss of PGP benefits.

Abuse of the Casualty Board

26. Based on his understanding of the jobs in question, Dr. Wald granted many Casualty Board members special exemptions from performing any type of light duty longshore work, including front and signal jobs, thereby, certifying them for only clerk work. Similarly, many short-term members of the Casualty Board obtained "no front, no signal" exemptions from their private physicians.

27. In about the summer of 1986, complaints from those on and off the Casualty Board regarding its operation increased to the point where the Joint Port LRC began to review the matter. Some complaints alleged abuses by certain individuals with "no front, no signal" exemptions who were

seen on or off the job performing activities inconsistent with the supposed disabilities. However, most complaints questioned the fairness of having up to 85 Casualty Board members receive first choice of extra clerk work under a "no front, no signal" exemption when clerk work in general involves the same physical requirements as signal work.

28. Accordingly, beginning in July, 1986, the Joint Port LRC began an extensive review of the issue of "no front, no signal" exemptions.

29. On November 18, 1986, Local 24 Secretary-Treasurer, Jim Gyerman, who also served on the Joint Port LRC, held a meeting with members of the Casualty Board to discuss the problem of abuses and ways to remedy the unfairness of the "no front, no signal" exemption. The matter was extensively debated within Local 13 at several

executive board and general membership meetings, attended by injured and non-injured longshoreworkers. A motion to eliminate the signal exemption but keep the front exemption was initially passed, reconsidered, and then held in abeyance pending additional input from Dr. Wald.

30. In February and March, 1987, members of the Joint Port LRC led Dr. Wald on two extensive tours of the Port area. In contrast to his initial tour in 1984, Dr. Wald was able to study a greater and more representative variety of signal and clerk jobs for longer periods of time with the specific purpose of comparing the two types of work. Dr. Wald was taken to nearly every facility operating on those days, including container and break-bulk operations.

31. At the conclusion of the second day of tours on March 4, 1987, Dr. Wald

met with the Joint Port LRC and informed them that it was his opinion that signal work is, in general, no more physically demanding than clerk work, and that, in a number of circumstances, a signal job may be physically less demanding than a clerk job; however, Dr. Wald stated that, in his opinion, front jobs are more strenuous and exemptions from such work should be granted where appropriate.

32. Based on Dr. Wald's opinion as well as the informed opinion and experience of the members on the Joint Port LRC, the Committee decided that effective June 15, 1987, exemptions from signal work would no longer be honored consistent with the initial policy stated when the Casualty Board was reorganized under the Consent Decree in 1983 that "if a longshoreman can perform clerk's work, he can perform signal work" and that "a longshoreman on the

Casualty Board must accept [at least] signal jobs prior to accepting clerk jobs".

33. Dr. Wald's better understanding of the nature of the jobs in question only affected his classification of signal and clerk work as being substantially the same. As Dr. Wald testified, to the extent that his prior evaluations were permanent, and since he now felt there was no physical difference between clerk and signal work, no further medical examinations were necessary.

The Similar Physical Requirements of Signal and Clerk Work

34. Plaintiffs allege that signal work is more physically arduous than clerk work and, therefore, they can only perform some or all clerk jobs in a safe and healthy manner. As a general rule, the evidence established that signal and clerk work involve substantially similar physical

requirements.

35. Both signal and clerk work involve a variety of different tasks and physical movements depending on the employers, facility, and stage of operations. In general, the function of a signalman is to aid in the safe and efficient movement of cargo by giving hand and/or radio signals to equipment operators. During a single shift, a signalman can and does perform at least three basic tasks - "blindside" signaling, signaling against the transtainer crane and signaling against the hammer-head crane. Blindside signaling, whick is performed in a jeep with a radio, does not, in fact involve any signaling per se other than to notify the transtainer operator of any interference on his blindside. In working against the front of a transtainer crane, the signalman can and often does use or have access to a vehicle.

A signalman working against the hammer-head crane generally works on his feet. Moreover, on at least five or six times during a shift, a signalman gets to relax for 15 to 20 minutes during the "coning off period" when the hammer-head crane is not working or when the transtainer moves to another row of cranes. Thus, signal work does not require continuous standing for long periods of time throughout the shift.

36. Nor does signal work of any variety require prolonged or frequent hyper-extension of the head and neck. The signal-person is required to focus on the container only when it is a few feet above the truck chassis or bombart and the observation can be covered by simple movement of the eyes upward.

37. Signalworkers are not required to use any specific forms of hand signals. The only requirements is that whatever

signals given must be intelligible to the crane operator. There is nothing that prohibits signalworkers from using certain signals that accommodate a physical disability.

38. With respect to clerk work, there are a variety of different jobs under this general heading divided by skill and pay. While the function of each type of clerk work, like signal jobs, remains the same, the specific job tasks and physical movements will vary depending on the employer, facility, and nature and stage of operation.

39. Many clerk jobs, such as gate clerk, "coopering" clerk, steel clerk and any ship clerk work on a vessel may be more physically demanding than signal work. The remaining clerk work, including truck delivery clerk, floor runner clerk and hatch clerk, involve substantially the same physical requirements as signal work.

Clerks in these jobs must work for significant periods on their feet and do a good deal of walking and standing in searching for containers and verifying their seal and container numbers. These clerks must also extend their head and neck when checking container numbers on containers stacked three or four high in rows roughly two to three feet apart. In verifying container seals and handing documentation to UTR drivers, these clerks must elevate their hand and arm at least shoulder level and sometimes higher.

40. Thus, signal work and clerks work involve substantially the same physical requirements in terms of walking, standing, raising of head and use of arms. The hardship is seen more in the particular physical activity rather than in a general job classification.

No Evidence of Bad Faith

41. There is not a sufficient distinction between the two jobs in question to render the Joint Port LRC's elimination of the signal exemption a bad faith decision and abuse of its discretion.

42. There is no independent evidence to suggest that the Joint Port LRC acted in bad faith to injured members on the Casualty Board.

43. There is no evidence to suggest that PMA members of the Joint Port LRC acted in bad faith.

44. Jan Hays has been serving as the affirmative action officer and fulfilling those responsibilities since the Consent Decree came into existence in 1983. It is noted that all of Dr. Wald's reports on plaintiffs and other injured longshoreworkers in 1985, 1986, 1987 and 1988 were addressed to Jan Hays. The PMA has since

formally announced Jan Hays' appointment as an affirmative action officer in compliance with this court's order. The issue of posting of a copy of the 1973 Rehabilitation Act in appropriate places has been resolved through the court's order of June 7, 1988.

Efficacy of the Dispatch Rules

45. Plaintiffs suggest and the court recommends that the dispatch rules be modified to allow for exemption by individual job within the job type of signal and clerk work to the extent such modifications would not be unreasonably difficult and burdensome to administer.

46. The court is aware that signal and clerk work often changes during a single shift as operations and conditions change and that each job type varies by employer and terminal.

47. In the event that any of the foregoing Findings of Fact also constitute

Conclusions of Law, they are also adopted as Conclusions of Law.

CONCLUSIONS OF LAW

1. In civil contempt proceedings, the contempt must be proved by clear and convincing evidence as initially indicated in the court's order herein. See, Vertex Distributing v. Falcon Foam Plastics, Inc., 689 F.2d 885, 889 (9th Cir. 1982). "This requires more than does the preponderance of evidence standard applicable in most civil cases". Id., see also, Battaglia v. United States, 653 F.2d 419, 422 (9th Cir. 1981).

2. "If a defendant's action 'appears to be based on a good faith and reasonable interpretation of the court's order' he should not be held in contempt." Vertex Distributing, 689 F.2d at 889.

3. "Since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts . . .". United States v. ITT Continental Baking Co., 420 U.S. 223, 236-37 (1975). Thus, the scope of the consent decree "must be discerned within its four corners, and not by what might satisfy the purposes of one of the parties to it". Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984) (quoting United States v. Armour Co., 402 U.S. 673, 681-82 (1971)).

4. Here, the record evidence establishes that defendants initially revamped the Casualty Board in accordance with the Consent Decree and properly exercised in good faith its discretion granted to it under the Decree in revitalizing effective June 15, 1987, its original policy of disallowing exemptions for signal work.

5. The express terms of paragraph 44 of the Consent Decree make clear that those on the Casualty Board will be dispatched "in accordance with local Dispatch Rules". The same paragraph also clearly provides that extra clerk work will not automatically be assigned to the Casualty Board but rather such work will be fairly distributed through the established low board system. The Casualty Board has been operated consistent with these provisions.

6. The Casualty Board as set up by the Consent Decree affirmatively and actively accommodates injured longshoreworkers. It allows them to gain special access to light duty jobs -- front, signal and winch -- to which they otherwise would have no special access. Signal jobs are the easiest longshore jobs. The injured longshoreworkers have access to these jobs right after the Swamper Board longshore-

workers -- those over 60 years of age and with 20 years of service. Since the Casualty Board is usually the low Board, the injured longshoreworkers get first priority to the extra clerk work before all other remaining longshoreworkers. The injured longshoreworkers also gain access to front and winch jobs generally available on the waterfront. All of these jobs are the lightest duty generally available on the waterfront. The Casualty Board goes even farther to accommodate injured longshoreworkers. The Casualty Board allows the injured to get exemptions from front work because front work is more demanding than other categories. The Casualty Board doesn't allow exemptions from signal work because signal work is generally not more demanding than clerk work.

7. With respect to the issues contained in the order, the evidence establishes

that, as a general rule, there is not a significant distinction between the physical requirements of signal and clerk work. Nor is there any evidence whatsoever to suggest that "defendant's new policy of considering the physical requirements to be equivalent was enacted by the JPLRC in bad faith, (i.e., an abuse of discretion)".

8. It is well establihsed that:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to

complete good faith and honesty of purpose in the exercise of its discretion. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). Based on the entire record and circumstances, the Joint Port LRC's decision at issue constituted a reasonable exercise of its broad discretion under the law and the Consent Decree.

9. Accordingly, for the above stated reasons, it is concluded that defendants have not violated the terms of the Consent Decree with respect to the Stephans Class and, therefore, Plaintiffs' contempt motion should be denied.

10. In the event that any of the foregoing Conclusions of Law also constitute Findings of Fact, they are also adopted as Findings of Fact.

Dated: (May 30, 1989)

/s/
ROBERT M. TAKASUGI
United States District Judge

APPENDIX E

LODGED

NOV 22 1982

Clerk U.S.Dist.Court
Central Dist. of Calif.
by (init.) Deputy

FILED

MAY 20 1983

Clerk U.S. Dist.Court
Central Dist. of Calif.
By (init.) Deputy

ENTERED

MAY 25 1983

Clerk U.S. Dist. Court
Central Dist. of Calif.
By (init.) Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEBORAH TAYLOR GOLDEN, CYDNEY CLAIRE BRADFORD, BOBBIE ANN GILMORE, MOLLEEN IVICEVICH, GAYLE M. JAMES, MARIAN KNIGHT, ELAINE TODD, GRETCHEN WILLIAMS, SHELLI H. BARDFORD, RHONDA ERVING, CANDACE STUEHLER, On Behalf of Themselves and All Other Similarly Situated Individuals,	)
Plaintiffs,	)
v.	)CONSENT)DECREE
PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WARHOUSEMEN'S UNIONLOCAL 63; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION LOCAL 13; INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, INTER-NATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION-PACIFIC MARITIME ASSOCIATION WELFARE PLAN; INTERNATIONAL LONGSHOREMEN'S	)

AND WAREHOUSEMEN'S UNION-PACIFIC MARITME ASSOCIATION PENSION PLAN,

Defendants.

CHARLES BOWER, GLEN M. BURNS, NORMAN FINN, GARY HINRICHS, MICHAEL A. MELGOZA, JOHN MORENO, HAROLD D. OLSEN, LEWIS R. SHER, LLOYD SMITH, FRANK E. WOODRUFF," on behalf of themselves and all other similarly situated individuals.

Plaintiffs in Intervention.

ROY H. STEPHENS, JERRY B. ANDRIES, ABRAHAM E. FREITAS, on behalf of themselves and all other similarly situated individuals,

Plaintiffs in Intervention.

PATRICIA PUENTE, URSULA M. PETERSEN, GUADALUPE RENDON, GLORIA WADE, DAVID STAMPER, DARRYL BOMBACK, JOHN CLAUSELL, THOMAS DANCY, LEON GRAVETT, DONALD KNIGHTON, FRANK ARELLANO, MARK KARMELICH, MARK GRGAS, ROY BUGARIN, on behalf of themselves and all other similarly situated individuals.

Defendants in Intervention.

The plaintiffs herein filed a class action complaint on October 27, 1980 in which it is alleged that the defendants have engaged in discriminatory employment

practices against women in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (hereinafter "Title VII"). The defendants in this lawsuit are Pacific Martime Association (hereinafter "PMA"), International Longshoremen's and Warehousemen's Union (hereinafter "ILWU"), Local 63 of the ILWU (hereinafter "Local 63 or "Clerk's Local") and Local 13 of the ILWU (hereinafter "Local 13" or "Longshore Local"). Defendant PMA is an employer's association of, among others, the stevedore companies at the Los Angeles-Long Beach Port (hereinafter "Port"). The union defendants are the collective bargaining representatives for employees performing marine clerk and longshore work for the PMA stevedore companies. This consent decree has been negotiated and settled specifically on the basis of the amended complaints.

In their amended complaint the plaintiffs allege discrimination against women in the hiring and registration of marine clerks and longshore workers at the Port.

Plaintiffs-in-Intervention Charles Bower, et al., intervened in this lawsuit on May 18, 1981. By their amended complaint this group of intervenors represents a class of persons who claim the defendants have violated certain rights of the plaintiffs-in-intervention under the collective bargaining agreement between PMA and the ILWU, under the Employee Retirement Income Security Act of 1974 (ERISA) and under other federal and state laws more particularly set forth in their amended complaint.

Plaintiffs-in-Intervention Roy H. Stephans, et al., intervened in this lawsuit on or about July 1, 1981. This group of intervenors represents a class of persons who claim that the defendants have

violated their rights under the National Rehabilitation Act of 1973, 29 U.S.C. § 973 and under other federal and state laws more particularly set forth in their amended complaint.

Defendants-in-Intervention Patricia Puente, et al., intervened in this action on or about February 19, 1982, to protect the interests of certain persons registered as new longshore workers in 1981 and 1982.

Extensive discovery has been conducted in this lawsuit. The plaintiffs and Bower plaintiffs -in-intervention have each filed two motions for preliminary injunction and motions for class certification. The Stephans plaintiffs-in-intervention also have filed a motion for a preliminary injunction and a motion for class certification.

All defendants have denied and continue to deny the allegations of the plaintiffs and both groups of plaintiffs-in-intervention.

By stipulation and order this case has been certified as a class action. The class represented by the plaintiffs is composed of the following persons:

(a) all women who in the past, present or future, have sought, are seeking or will seek work as either marine clerks or longshore workers at the Port;

(b) all women who in the past, present or future have sought, are seeking or will seek to be registered as either marine clerks or longshore workers at the Port;

(c) all women who in the past, present or future did not, do not or will not apply for marine clerk work or registration or for longshore work or registration at the Port, due to defendants' alleged discriminatory employment practices against women;

(d) all women who in the past, present or future have performed, are performing or will perform clerk or longshore work in a non-registered status at the Port.

By stipulation and order the class represented by the Bower plaintiffs-in-intervention is composed of all persons who are not registered marine clerks and who are not women, who prior to the entry of this Decree, have been dispatched to marine clerk jobs by the marine clerk dispatch hall operated by Defendants PMA and Local 63.

By stipulation and order the class represented by the Stephans plaintiffs-in-intervention is composed of all persons who have been, or are qualified, or in the future would qualify to be dispatched to extra clerks' work as "injured" longshoremen as that term is used by the Port

dispatch committees.

For purposes of this settlement and the obligations and covenants herein undertaken, the Pacific Maritime Association (sometimes referred to herein as "PMA") shall mean only the Southern Division of PMA, i.e., the entity located at 627 North Fries Avenue, Wilmington, California. The obligations and covenants undertaken herein by the Pacific Maritime Association and/or its member companies shall relate solely to the Los Angeles-Long Beach Port and shall not extend to any other port or city.

The obligations and covenants undertaken herein by the International Longshoremen's and Warehousemen's Union ("ILWU") shall relate solely to the Los Angeles-Long Beach Port, and shall not extend to any other port or city or any local unions affiliated with the International Longshoremen's and Warehousemen's Union other than

Locals 13 and 63.

The parties herein have informed the Court by way of a stipulation of settlement that they have reached a settlement of all claims of all parties and all class members herein. Notice to the represented classes has been carried out and a hearing has been held at which all class members had the right to appear and object to the settlement reflected in this Consent Decree. At the said hearing the Court determined that the settlement set forth in the instant Decree is fair to all parties, including the represented classes.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I

GOLDEN PLAINTIFF CLASS RELIEF

A. General

1. The defendants, for the term of this Decree, are permanently enjoined from

any discriminatory employment practice concerning the registration of women as marine clerks or longshore workers at the Port.

2. By entering into this Decree defendants do not, in any way, concede any violation of Title VII or any other statute, regulation, provision or law prohibiting employment discrimination based on sex. The entry of this Decree in no way shall be construed to constitute an adjudication or finding that there have been past discriminatory employment practices by defendants, it being understood that defendants unequivocally deny that any such practices have been or are being carried out.

3. All registration or transfer obligations herein undertaken by the defendants shall be subject to reasonable conditions of business necessity and feasibility and all requirements of law governing employment and shall be based upon the availabilit

without recruiting efforts beyond those customarily and historically carried out by the PMA, of qualified applicants eligible and desirous of being registered or transferred.

B. Clerk Registration Goals

4. The defendants shall adopt the long range goal of employing women as marine clerks at the Port in sufficient numbers to eliminate the continuing effects of any possible past discrimination. This long range goal shall be deemed achieved when twenty-five percent (25.0%) of all registered marine clerks at the Port are women. At such time as this long range goal is met, defendants shall be relieved of all obligations in this Decree other than those set forth in paragraph A.1, above.concerning the employment of women as marine clerks.

5. In order to meet the long range goal, each calendar year beginning in 1983, no less than thirty percent (30.0%) of the persons transferred from longshore to clerk registration at the Port shall be women. During the effective term of this Decree, defendants shall in good faith engage in reasonable efforts to meet the above percentage goals. The above-stated percentage goals shall apply without regard to the method adopted by the ILWU and PMA to fill marine clerk positions at the Port.

6. The short term goals for 1982 shall be that as soon as practicable after entry of this Decree, defendants shall register no less than seventy-five (75) new "B" registered marine clerks, of whom thirty-seven (37) shall be women. The 37 women to be registered under the instant paragraph, shall be selected according to the following criteria;

(a) first priority shall be given to those women applicants who have worked more than 200 hours as marine clerk "casuals" in any of the last three calendar years, assuming such women are otherwise qualified;

(b) second priority shall be given to those women not satisfying 6(a) immediately above who are among the named plaintiffs in this lawsuit assuming such women are otherwise qualified.

(c) the first persons eligible to be registered pursuant to this paragraph, assuming they are otherwise qualified, shall be the persons listed on Exhibit A hereto.

7. None of the 37 women to be registered as new "B" marine clerks under paragraph 6 shall be persons who currently are registered longshore workers, with the

exception that women who are registered longshore workers who qualify under paragraph 6(a) or 6(b) immediately above, may nonetheless be among the 37 women registered as marine clerks.

C. Longshore Registration Goals

8. The defendants shall adopt the long range goal of employing women as longshore workers at the Port in sufficient numbers to eliminate the continuing effects of any possible past discrimination. This long range goal shall be deemed achieved when twenty percent (20.0%) of all registered longshore workers at the Port are women. At such time as this long range goal is met, defendants shall be relieved of their obligation in this Decree other than those set forth in paragraph A.1, above, concerning the registration of women as longshore workers.

9. In order to mmet the long range goal, there shall be the following short term goals:

(a) for the next nine hundred (900) persons registrred as new class "B" longshore workers, at least thirty-five percent (35.0%) of each one hundred (100) persons so registered shall be women;

(b) after the nine hundred (900) registrations described immediately above have taken place, at least twenty-five percent (25.0%) of each one hundred (100) persons registered as longshore workers shall be women.

D. Transfers

10. All preliminary injunctions and/or restraining orders issued by this Court during the course of these proceedings shall be dissolved as provided for in the Stipulation for Class Certification

and lodging of Consent Decree concurrently filed herewith.

11. The defendants shall not add to the marine clerk registry by any method during the calendar year 1982, other than as previously set forth, provided that nothing in this Decree shall prohibit the defendants from registering the children of deceased longshoremen and marine clerks in accordance with the terms of the "permissive rule" set forth more particularly in the Pacific Coast Longshore and Clerk Contract Agreement.

12. All persons who become registered marine clerks or registered longshore workers at the Port, whether by new registration, by transfers, or by other procedures shall be counted in determining whether the goals of this Decree have been met.

E. Effect of Decree

13. Except as specifically provided herein, no monetary, injunctive, or other relief shall be granted to any member of the class represented by the plaintiffs in this action. The relief afforded the Golden plaintiff class members herein shall constitute a full and complete remedy for all of their employment discrimination claims which may exist under Title VII and any and all other laws that prohibit employment discrimination based on gender, as concerns their hiring, registra, dispatch or employment as marine clerks or longshore workers at the Port.

14. With respect to all issues of law and fact and all matters of relief within the scope of the Amended Complaint or of this Consent Decree, the doctrines of res judicata and collateral estoppel shall apply to the named parties and to all

members of the class represented by plaintiffs. No individual or organization shall be permitted to seek or obtain, in a separate action or proceeding, relief which would add to or be inconsistent with the relief afforded by this Decree.

15. In the event this Decree or any part thereof is in any way challenged in any proceeding, the parties and their attorneys will assist fully in the defense against such a challenge. In any such proceeding, plaintiffs may seek attorneys' fees only against a challenging or objecting party and fees may not be awarded against any non-challenging or non-objecting Defendant.

16. Should any dispute areise as to the application, implementation or interpretation of this Decree, the parties, through their attorneys, shall first attempt to resolve the dispute among themselves.

In the event that they are unsuccessful, the matter shall be submitted to the Court. If the Court finds the defendants to be in violation of this Decree, the Court may enter a specific order of enforcement.

17. The parties hereto agree to implement and abide by the provisions of this Decree in good faith.

18. No action taken pursuant to this Decree shall be deemed to be discriminatory or violative of any provision of law, if at any time during the term of this Decree, the Supreme Court of the United States and/or the Ninth Circuit Court of Appeals shall decide as a final matter that affirmative action objectives such as those contained herein are unconstitutional, otherwise unlawful, beyond the scope of relief affordable pursuant to Title VII, or beyond the authority of this Court to order without a trial on the merits of this action, the

defendants may apply to the Court by motion for a dissolution or modification of this Decree.

19. The provisions of the relevant collective bargaining agreements as well as all rules, regulations and procedures developed thereunder, and any modifications thereof, shall apply fully to this Decree and the implementation thereof, except as is required to achieve compliance with the goals and other provisions of this Decree.

20. In implementing the percentage goals in this Decree, defendants shall comply with the requirements, if any, of the consent decree in Cigar, et al. v. ILWU Local 63, et al. (No. 72-1480-JWC).

21. Should there be an appeal by an objector to entry of this Decree, there shall be no stay of any of the provisons of this Decree pending such appeal.

F. Qualifications

22. Nothing in this Decree shall be construed to require defendants to hire, register, dispatch, or employ any persons who are not qualified to perform marine clerk or longshore jobs.

23. The parties to the ILWU-PMA Pacific Coast Longshore and Clerks Agreement shall establish the qualifications and selection criteria and procedures for all registrations and transfers, providing that if selection criteria or procedures are utilized which make it impossible for defendants to satisfy the registration goals of this Decree, the defendants shall be required to show, under applicable legal and professional standards, that the said criteria or procedures are job related and justified by business necessity.

G. Monitoring and Reporting

24. For the duration of this Decree, upon good cause shown the plaintiffs may engage in normal discovery under the Federal Rules of Civil Procedure.

25. On or about each February first, for the duration of this Decree, defendants shall serve upon plaintiffs' counsel, or their designees, and file with the Court, a report setting forth the following information:

(a) the number, by sex, of marine clerks and longshore registered worker positions filled at the Port during the preceding calendar year;

(b) the total number of registered marine clerks and longshore workers, by sex, who are in the "A" class status and "B" class status at the Port;

(c) the total number of days worked in marine clerk work, each month during the preceding calendar year, by persons who are not registered marine clerks or registered longshore workers;

(d) the total number of days worked in longshore work, each month during the preceding calendar year, by persons who are not registered marine clerks or registered longshore workers;

(e) the total number of days worked in marine clerk work, each month during the preceding calendar year, by persons registered as longshore workers.

26. All information received by counsel for plaintiffs pursuant to the provisions of paragraph 25 above, shall be used solely for purposes of monitoring or

enforcing the terms of this Decree and shall not be otherwise disclosed or disseminated to any person or organization without the prior consent of the defendants.

H. Registration Procedures

27. Defendants shall develop an application and registration procedure that limits the number of applications that will be accepted for each registration period, that allows applications to remain active for more than one period of registration and that permits the registration of small groups of marine clerk and longshore workers provided that such procedures whall not operate to preclude defendants from meeting the goals of this Decree. Specifically, at no time must the Joint Port Labor Relations Committee or that committee in charge of registration, whatever its name or composition, accept applications from more than three times the number of persons to be

registered to interview more than two times the number of persons to be registered, provided sufficient qualified candidates are developed through such processes to meet the goals of this Decree. Applications for registration may be deemed current and valid for a period of three years from the date of filing.

28. For the duration of this Decree, defendants shall register and transfer sufficient numbers of employees to meet the longshore and marine clerk work force requirements of the Port. The numbers of employees to be registered and transferred shall be determined by defendants pursuant to the terms of the Pacific Coast Longshore and Clerks Agreement, subject to the above requirements and the goals expressly set forth in this Decree. If plaintiffs believe that defendants have failed to register and transfer employees as required herein,

they may apply to the Court for an order enforcing, modifying or reopening the terms of this Decree. The Court shall grant plaintiffs such relief only if they establish that defendants' failure to register and/or transfer employees constitutes a substantial interference with the purposes of this Decree and is not justified by lack of adequate work opportunity. Under no circumstances shall defendants be required to register or transfer employees if the effect thereof would be to reduce the amount of work normally available to registered workers based on past practice.

29. For the duration of this Decree, Class "B" longshore and marine clerk workers shall be advanced to Class "A" status within one (1) year of their registration unless the effect of such advancements would be to reduce the amount of work normally available to existing Class "A" registered

workers as per past practice. The schedule for such advancements shall be determined by defendants subject to the terms of the Pacific Coast Longshore and Clerks Agreement and established past practices. If plaintiffs believe that defendants have failed to advance Class "B" workers as required herein, they may apply to the Court for an order enforcing, modifying, or reopening the terms of this Decree. The Court shall grant plaintiffs such relief only if they establish that defendants' failure to advance Class "B" workers constitutes a substantial interference with the purposes of this Decree and is not justified by lack of adequate work opportunity.

30. If attempting to meet the goals or timetables of this Decree causes a burden or hardship on the defendants or affects the efficiency of the Port or dispatch hall, then the defendants may move to set

aside this Decree in whole or in part. In such a proceeding, the Court shall establish the matters to be resolved and the burden of proof or persuasion in accordance to the then applicable legal principles. In entering into this Decree the parties mutually believe that women registered as marine clerk or longshore workers are expected to meet the normal availability and work performance standards generally applicable to marine clerk and longshore workers, respectively.

I. Attorneys' Fees

31. Solely for purposes of determining entitlement to attorneys' fees and costs under 42 U.S.C. § 2000e-5(k), plaintiffs shall be deemed to be the prevailing party. The amount of the attorneys' fees and costs shall be separately negotiated after lodging of this Consent Decree. In the event the parties cannot agree upon

the amount of attorneys' fees and costs, the matter shall be submitted to a special master, (to be agreed upon by the parties) for determination.

32. Issues relating to discovery or procedures before the special master shall be decided by the special master. The judgment of the special master as to the amount of reasonable attorneys' fees and costs, as well as any findings of fact and conclusions of law, shall be final and non-appealable. Any award made by the special master shall be paid within twenty days of the date of his or her decision. The determination and award of attorneys' fees and costs, whether by negotiation or by the special master, and the payment of said fees shall not be delayed by reason of an appeal by an objector or intervenor whose objection to the settlement has been overruled by the District Court.

33. Counsel for plaintiff class shall not be awarded attorneys' fees for the routine review of the annual reports received and routine monitoring of this Decree. Such counsel shall be entitled to an attorneys' fee award should an unresolved dispute between plaintiffs and defendants arise as to the interpretation or the implementation of this Decree, provided that the plaintiffs prevail in the said dispute.

J. Duration of Decree

34. This Decree shall remain in effect until such time as the "long range" goals for both marine clerk and longshore workers are satisfied, or until fifteen years have elapsed after entry of the Decree, whichever occurs first, at which time defendants may seek and obtain a dissolution of this Decree. The Court shall retain jurisdiction over this lawsuit until such time as the Decree is dissolved.

K. Separate Class Settlement Provisions

35. The above-stated provisions shall apply only to settlement of the Golden Plaintiff Class claims, unless the above-stated provisions are specifically incorporated by reference into the Bower or Stephans Class settlement provisions set forth below.

II

BOWER PLAINTIFFS-IN-INTERVENTION CLASS RELIEF

36. Paragraphs 2, 3, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 29, 30 are incorporated here as though fully set forth. To the extent any of the above paragraphs are limited to females or to the Golden Class only, they shall be construed as though applicable to this Class.

37. Except as specifically provided herein, no monetary, injunctive, or other relief shall be granted to any member of

the class in this action. The relief afforded the Bower class members herein shall constitute a full and complete remedy for any and all claims which may exist under any law, state or federal, concerning their hiring, registration, dispatch, employment or lack thereof, including compensation, fringe benefits or claims under ERISA as longshoremen or marine clerks at the Port.

38. As soon as practicable after the entry of this Decree defendants will register seventy-five (75) new "B" card marine clerks, of whom 38 will be members of the Bower class. The 38 persons to be registered will be those members who, assuming they are otherwise qualified, have worked the greatest number of hours in the Port, as maritime clerks, between July 1, 1979 and July 1, 1982.

39. In the normal course of business, and depending upon the needs of the Port,

possible dilution of the longshore work-force and possible impact on P.G.P., the PMA and Local 13 will register new Class "B" longshore workers from time to time under paragraphs 27 and 28 hereof. The first 50 persons registered hereinafter shall be members of the Bower class; said persons will be those who, assuming they are otherwise qualified, have worked the greatest number of hours in the Port between July 1, 1979 and July 1, 1982, as marine clerks, and have not been selected as Marine Clerks pursuant to paragraph 38.

40. Any issue as to attorneys fees and costs, including entitlement thereto, may be presented to the Court and resolved by applicable law.

III

STEPHANS PLAINTIFFS-IN-INTERVENTION
CLASS RELIEF

41. Paragraphs 2, 3, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 30 are incorporated here as though fully set forth. To the extent any of the above paragraphs are limited to females, or to the Golden Class only, they shall be construed as though applicable to this Class.

42. Except as specifically provided herein, no monetary, injunctive, or other relief shall be granted to any member of the class in this action. The relief afforded the Stephans class members herein shall constitute a full and complete remedy for any and all claims which may exist under any state or federal law, including those prohibiting employment discrimination based on physical condition, as concerns their hiring, registration, dispatch,

employment or lack thereof as longshoremen or marine clerks at the Port.

43. It is recognized that there presently exists a "casualty board" at the dispatch hall in the Los Angeles-Long Beach Port and a procedure whereby longshore persons who claim to be injured can receive check-in rights on this board. It is also recognized that there presently exists, in the Port, a procedure whereby injured longshore persons can be dispatched to extra marine clerks work. A predicate to receiving such check-in or dispatch rights, is the submittal of a doctor's report or certificate which purports to set forth the longshoreman's injuries. It is also recognized that in the past there may have been abuses of this system because of feigned injury or illness.

44. In order to provide for a more equitable assignment of this work, all of

which is intended to provide employment for longshore workers temporarily or permanently disabled, all "front jobs," as that term is presently understood in the Port, shall hereinafter be assigned to the Casualty Board, together with all extra marine clerk jobs during any and all days on which said board is the "low board" as that term is presently understood in the Port. All such work on the Casualty Board, including work currently dispatched from said board, shall be dispatched in accordance with local Dispatch Rules to persons who have check-in rights on that board. It is expressly understood and agreed that the Casualty Board shall be deemed to be the "dispatch category" referred to in Section 20.42 of the PCLCD.

45. Except as hereinafter provided, upon execution and approval of this decree, all persons desiring to receive "check-in"

rights on the Casualty Board must first be examined by a physician or physicians chosen by the Joint Port Labor Relations Committee. Said physician(s) shall prepare a report which shall constitute the sole physician's report before the Committee who approves check-in rights on said board. Any person dissatisfied with the decision of said Committee shall have all normal grievance and arbitration rights and remedies.

46. All persons presently holding a "permanent" check-in right on the existing casualty board whall not be required to undergo another physical examination to retain said privilege unless so directed by the Joint Port Labor Relations Committee. All longshore persons presently classified as "injured" for purposes of receiving extra marine clerks work shall be allowed directly on to the Casualty Board until expiration

of their present disability status, at which time they shall be recertified to the Casualty Board only upon compliance with the requirements of paragraph 45, abo above.

47. In making a determination that an injured longshore person be certified to check-in on the Casualty Board, the Joint Port Labor Relations Committee shall further consider whether an injured longshore person would be unable to perform certain work dispatched from the Casualty Board. If the Committee so determines, based upon the physician's report, it shall specify the types of work that the injured longshore person need not perform. If such a determination is made, it shall become a part of the certification of that longshore person to the Casualty Board and the person so certified may thereafter, so long as he or she remains so certified, refuse any

such work offered that would be in contravention of the certification. Such refusal of work shall not be considered as grounds for denying benefits to a injured longshore person under the Pay Guarantee Plan or for any penalty whatsoever.

48. In addition to the affirmative action set forth above, the defendants shall designate an employee of the Joint Port Labor Relations Committee as the Affirmative Action Officer, with responsibility for overseeing this process. All applicable posters issued by the Department of Labor with respect to the 1973 Rehabilitation Act shall be posted in the PMA's office, and in the joint dispatch halls of Local 13 and Local 63.

49. In connection with any future transfers of Class A longshoremen to the clerks' registry, the selection process may be challenged, if legally appropriate, for

not complying with applicable legal selection device principles.

50. In addition to the affirmative action provided above, any vacancies created on or before December 18, 1982 by the death, resignation or retirement of any longshoreman presently scheduled to transfer (as one of the original 108) shall be filled by the most senior and seriously disabled "injured longshoreman," providing he or she is otherwise qualified and able to perform the work.

51. Any issue as to attorneys' fees and costs, including entitlement thereto, may be presented to the Court and resolved by applicable local court and federal procedural and substantive rules.

DATED: (November 22), 1982

GIBSON, DUNN & CRUTCHER
KENNETH E. RISTAU, JR.
DENNIS A. GLADWELL

/s/
DENNIS A. GLADWELL

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/s/
CARL E. KOHLWEK

Attorneys for Plaintiffs-In-Intervention, Stephans et al.

ORDER

IT IS SO ORDERED.

/s/
Judge, United States District Court

MEMORANDUM RE
FAIRNESS OF SETTLEMENT

FILED

MAY 20 1983

U. S. DISTRICT COURT

DEPUTY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALFORNIA

DEBORAH TAYLOR GOLDEN, et al.,

Plaintiffs,

vs.

PACIFIC MARITIME ASSOCIATION, et al.,

Defendants.

Presently before this court is a petition by the plaintiffs and defendants in the above-captioned matter to approve a proposed consent decree submitted on November 22, 1982. In determining whether the proposed consent decree is fair, reasonable and adequate, this court conducted extensive fairness hearings on January 17, 1983, January 24, 1983 and February 4, 1983. The court invited testimony and briefing

from the attorneys of record for the parties, attorneys representing objectors is the consent decree and the individual objectors themselves.

I. PARTIES

Defendant Pacific Maritime Association ("PMA") is an association of companies in the shipping, receiving and warehousing of merchandise in the Pacific Coast Longshore Industry, Los Angeles - Long Beach Port ("Port"). PMA is the sole employer relationship with members of defendant International Longshoremen's and Warehousemen's Union ("ILWU"), defendant International Longshoremen's and Warehousemen's Union Local 63 ("L-63") and defendant International Longshoremen's and Warehousemen's Union Local 13 ("L-13").

Defendant L-63 is a chartered local of defendant ILWU with its principal offices in Wilmington, California. L-63 maintains joint

control with the PMA over the marine clerks' dispatch hall in the Port area. All persons who desire employment as marine clerks in the Port area must obtain work through said dispatch hall. The job of marine clerk involves the tallying, sorting and checking of cargo for shipment to and from the Port.

Defendant L-13 is a chartered local of defendant ILWU with principal offices in Wilmington, California. L-13 maintains joint control with the PMA over the longshore dispatch hall in the Port area. All persons who desire employment as longshore workers in the Port area must obtain such work through said dispatch hall. The longshore work consists of the loading and unloading of cargo for shipmment to and from the Port.

Defendant ILWU is a labor organization doing business through its authorized representative in the County of Los Angeles, State of California. The ILWU is the parent

organization of L-63 and L-13 and is the sole bargaining agent for those persons employed as marine clerks and longshore workers by the PMA. It is within the sole discretion of the ILWU and the PMA, acting jointly through the Joint Coast Labor Relations Committee, to determine which persons shall be registered as marine clerks or longshore workers.

Defendants ILWU-PMA Welfare Plan ("Welfare Plan") and ILWU-PMA Pension Plan ("Pension Plan") are multi-employer trust funds created and maintained pursuant to Sections 302 of the Labor Management Relations Act, 29 U.S.C. § 186. The Welfare Plan is an employee welfare benefit plan as defined in Section 3(1) of the Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. § 1002(1). The Pension Plan is an employee pension benefit plan as defined in Section 3(2) of ERISA, 29 U.S.C. § 1002(2).

Defendants-in-intervention Patricia Puente, et al., intervened in this action on or about February 19, 1982 to protect the interest of approximately 451 new registered "S" longshoremen of L-13 who began work during the week of January 18, 1982.

Plaintiffs Deborah Taylor Golden, et al., ("Golden") have filed a class action complaint for injunctive relief charging defendants with violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 20003 et seq. The Golden Class consists of:

(1) all women who in the past, present or future, have sought, are seeking or will seek work as either marine clerks or longshore workers at the Port;

(2) all women who in the past, present or future, have sought, are seeking or will seek to be registered as either marine clerks or longshore workers at the Port;

(3) all women who in the past, present or future did not,

do not or will not apply for marine clerk work or registration or for longshore work or registration at the Port, due to defendants' alleged discriminatory employment practices against women;

(4) all women who in the past, present or future have performed, are performing or will perform clerk or longshore work in a non-registered status at the Port.

Plainitffs-in-intervention Charles Bower, et al. ("Bower") intervened in this action on May 18, 1981. Bower filed its class action complaint for damages, declaratory relief and injunctive relief alleging, inter alia, a breach of the collective bargaining agreement, breach of fair representation and breach of fiduciary and statutory duties under ERISA. The Bower class is composed of all male persons who are not registered marine clerks, and who have been dispatched to marine clerk jobs by the marine clerks dispatch hall.

Plaintiffs-in-intervention Stephans, et al. ("Stephans") intervened in this action on July 1, 1981. Stephans filed a class action complaint alleging, inter alia, violations of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(a). The Stephans class is composed of all persons who have been, or are qualified, or in the future would qualify to be dispatched to extra clerk's work as "injured" longshore workers as that term is used by the Port dispatch committees.

II. FACTUAL BACKGROUND

The ILWU-PMA Pacific Coast Longshore and Clerks Agreement ("PCLCA") covers a bargaining unit consisting of all longshore workers and marine clerks employed by PMA member companies in the states of California, Oregon and Washington. The agreement is set forth in two separate documents, the Pacific Coast Longshore Contract Document ("PCLCD")

and the Pacific Coast Clerk's Contract Document ("PCCCD"). Pursuant to these agreements, there is an order of dispatch from the longshore workers's and clerk's hall through which employees are assigned their daily work at the Port. There is a five-tiered hierarchy of rights and benefits for individuals seeking work as marine clerks. The first level is comprised of registered "A" class clerks who are accorded all available clerk work before any other class of individuals at the Port. The second level consists of registered "B" class clerks who may be dispatched after all "A" class clerks have been given an opportunity. When all "A" and "B" class clerks have been dispatched, registered "A" and "B" class injured longshore workers who are able to perform clerk work have the next preference in being dispatched as clerks. The fourth ranking class of individuals to be dispatched as clerks consist of longshore

workers who are on the Payment Guarantee Plan ("PGP").[1/] When the volume of work is so substantial that categories one through four are exhausted, the remaining work is allocated to casual[2/] workers on an apparent first-call, first-served basis.

For two years prior to the filing of this action, defendants planned to select new clerks to fill existing vacancies of "B" class clerks. The delay in selection emerged from a dispute among the defendants as to whether some or all of the new clerks should be transferees from the longshore local L-13, or whether the new clerks should instead be chosed from applicants with no prior affiliations with the ILWU or L-13. Defendant L-63 had taken the nonaffiliation position. Defendant PMA has generally agreed with L-63's position. Defendant ILWU and L-13 contended that all new clerks should be transferees from L-13 so long as there were longshore